Supreme Court of the United States

OCTOBER TERM, 1879.

No. 289.

LAWRENCE G. GRAHAM et als.

vs.

LA CROSSE AND MILWAUKEE RAILROAD CO. et als.

PART OF RECORD.

Thomas McGill & Co., Law Printers, Washington, D. C

Supreme Court of the United States.

LAWRENCE G. GRAHAM ET AL.

vs.

THE LA CROSSE AND MILWAUKEE RAILROAD COMPANY ET AL.

It is hereby stipulated that the annexed papers, copies of depositions of Edward P. Whaling and Stoddard Judd and Alexander Mitchell, and copy of resolutions of La Crosse Company from the above-entitled cause, shall be filed and become part of the record in this cause, with the like effect as if the same had been embraced in the original return of the clerk; the same having been read on the trial of the case below, and having been omitted by the clerk of the Circuit Court by inadvertance in making up the record.

Dated April 16, 1880.

E. MARINER,
Solicitor for Defendants Ludington, Kneeland's heirs, and in his proper person.

JOHN W. CARY,
Solr. for Deft. M. &. St. P. R. R. Co.

Circuit Court of the United States for the Eastern District of Wisconsin.

Newcomb Cleveland
vs.
The La Crosse and Milwaukee Railroad Company, Selah Chamberlain *et al.* } In Equity.

Deposition of Alexander Mitchell, taken on behalf of the complainant, before Winfield Smith, one of the masters and commissioners of this court, by consent of parties.

SATURDAY, *November* 6, 1858.

Present: Mr. Brown, of counsel for the complainant, and Mr. Emmons, of counsel for the defendant Selah Chamberlain.

Alexander Mitchell, being duly sworn, says: I have resided in this city over nineteen years. I have during that time purchased, owned, and sold considerable real estate. I have a general idea of the value of real estate in this city in the year 1855. I know blocks 3 and 47 in the Fifth ward, and blocks 155, 156, 157, and 158 in the Fourth ward. I had some general knowledge of the value of that property in September, 1855. My opinion is that lots 9, 10, and 11 in block 3 were worth then somewhere about $100 a foot, and lots 1, 2, and 3 in block 47, I should say were then worth not over $40 a foot. Block 155, except lot 3, I should suppose worth in 1855 somewhere about $40 per foot. Block 157 I should not consider then worth over $10 or $15 a foot. I should value them without reference to the navigable water, not knowing whether the bayou is or is not to be made navigable. I do not know what the bayou was worth. I do not know how many lots there were in it. Perhaps it would average $1,000 a lot; those on Reed street more; those back, less. I think lots 8, 9, 16 and 17 in block 158 were worth $80 per foot. Lots 10, 12, 13, 14 and the east half of 15 in the same block might be worth then $70 a foot. Lots 1 and 4 in block 156, I should say $20 to $25 a foot; about $1,200 for the two lots, one of them being a fraction. This property was then speculative sort of property, about the value of which men might differ very widely. It required a large amount of money to make it useful. There had been no sales in that particular spot, that I know of. The property was different from business property, which is being constantly bought and sold.

Cross-examined:

I think at that time it would have cost between $700 and $800 a lot to fill and dock the lots in block 155 and fill one-half the street adjoining them. I think to put them in first-class condition would require $1,000 a lot for the river-front lots. I don't know the precise depth of the filling necessary. I estimate from the cost to us of filling lots near them in blocks 45 and 49; we filled up a portion of the

river and changed its channel with the dredge; we took soundings on some portions of our own, and the depth ranged from 4 to 7 feet. My estimate is based upon such a depth. If the filling was much deeper, of course it would cost more, although perhaps not in the same proportion. We made a sale the year before (in 1854) in block 11, which is the nearest in time and location that I know of. The value of property there was, in 1855, a good deal speculative. It was not established, as in localities where so great expenditure of money was not required.

Question. How did the value of lots in block 155 compare, per foot, with lots on East Water street, between Wisconsin street and Dousman's warehouse, in 1855?

(Objected to as immaterial and as furnishing no proper basis of estimate.)

A. I should consider the property on East Water street worth about ten times as much per foot as the other.

The estimates of value which I have given of these lots are of course upon the supposition that the title was perfect. The property, except lots 9, 10, and 11 in block 3, and part of the east end of block 158, was under water in 1855; with the exception of the property so excepted, the property could not be put to any use that I am aware of. I think, on reflection, that the lots in block 3 may have been worth more than I have estimated them. It is very difficult to fix the value of these lots at any particular time, when values change so rapidly. I think the lots in block 3 might have been worth $25 to $50 a foot; $25, at least, more than I stated if they reached navigable water.

Q. What was the sale made by you in 1854 which you spoke of?

(Objected to as immaterial.)

A. It was of lots 8, 9, 10, 11, and 12 in block 4, in the Fifth ward. The price was $700 a lot in stock in the Menominee Locomotive Foundry Company, which was then deemed equal to cash.

ALEX. MITCHELL.

UNITED STATES OF AMERICA, *Eastern District of Wisconsin*, } *ss:*

I, Edward Kurtz, clerk of the Circuit Court of the United States of America for the Eastern District of Wisconsin, do hereby certify that I have compared the foregoing with

its original, now on file and of record in my office, and that the same is a true and correct copy of the deposition, on behalf of the complainant, of Alexander Mitchell in the suit of Newcomb Cleveland *v.* The La Crosse and Milwaukee Railroad Company *et al.*

In testimony whereof, I have hereunto set my hand and duly affixed the seal of the said court at the city of Milwaukee, in said district, this 20th day of April, in the year of our Lord one thousand eight hundred and eighty, and of the Independence of the United States the 104th.

[SEAL.] EDWARD KURTZ, *Clerk.*
By B. M. MILLER, *Deputy.*

At a special meeting of the board of directors of the La Crosse and Milwaukee Railroad Company, held at the office of the company in the city of Milwaukee on Monday, March 8, 1858—

Directors present:

E. H. Goodrich,
J. Hadley,
M. Kneeland,
Byron Kilbourn,
M. Luther,
Eli Perry,
H. L. Palmer, and
Stephen Clark, president.

Directors absent—

J. B. Brewster,
Artemas Fish,
A. Naxon,
Dr. N. Radcliff, and
David E. Wheeler.

Among other proceedings the following were had:

Mr. Palmer presented the following preamble and resolutions, which were read and, on motion of Mr. Palmer, laid upon the table:

Whereas this company did, by deed bearing date September 8, 1855, sell and convey unto Charles D. Nash the following described real estate, situate in the Fourth ward of the city of Milwaukee, to wit: Lots 1, 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, and 14 in block 155; lots 1 and 4, block 156; one-eighth block 157, except lot 8, with the bayou adjoining lots 10, 12, 13, 14 and E. $\frac{1}{2}$ of lot 15; one-third of lots 8, 9, 16, and 17 in block 158; and did also convey to said Nash, by deed bearing date July 14, 1856, the following described lots in the Fifth ward of the city of Milwaukee, to wit: Lots 9, 10, and 11 in block 3, and lots 1, 2, and 3 in block 47, and received from said Nash his bond

of indemnity against certain incumbrances upon said property, for which this company was liable;

And whereas said Nash afterwards conveyed these said premises to Moses Kneeland, said Kneeland substituting his bond of indemnity to this company for said Nash's, said Kneeland being at the time of said purchase and sale of said property a director in this company and a member of the executive committee;

And whereas it has been charged that said Kneeland has an interest in the purchase of said premises by said Nash from this company, and by reason thereof and by reason of said Kneeland's being at the time of such purchase a director and member of the executive committee of this company, the said Kneeland has only a trust estate in said premises; and whereas this company is desirous of perfecting the title to said premises in said Kneeland, his heirs and assigns:

Therefore *Resolved*, That the title, legal and equitable, of the said premises, and the deeds conveying the same, be and are hereby confirmed in and to the said Kneeland, his heirs and assigns, so far as this company has any interest therein.

On motion of Mr. Kilbourn the preamble and resolution in relation to the conveyance of certain lots to Mr. Moses Kneeland be referred to a committee of three, of which the president shall be one, for investigation, and to report to a subsequent meeting of the Board.

The president appointed the following committee: Mr. Perry and Mr. Luther, as such committee, to act with himself.

The board of directors of the La Crosse and Milwaukee Railroad Company met pursuant to adjournment at the office of the company in the city of Milwaukee at 3 o'clock in the afternoon of Wednesday, March 10, 1858.

Directors present:

Edwin H. Goodrich,
Jackson Hodley,
Byron Kilbourn,
Moses Kneeland,
George M. Luther,
Eli Perry,
H. L. Palmer, and
Stephen Clark, president.

Directors absent:

S. H. Adlen,
Artemas Fish,
Alfred Naxon,
D. N. Radcliff, and
David E. Wheeler.

Among other proceedings the following were had:

The committee, consisting of Messrs. Clark, Perry, and Luther, to whom the following preamble and resolution, to wit:

Whereas this company did, by deed bearing date September 8, 1855, sell and convey unto Charles D. Nash the following described real estate, situate in the Fourth ward of the city of Milwaukee, to wit: Lots 1, 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, and 14 in block 155; lots 1 and 4, block 156; ⅛ block 157, except lot 8, with the bayou adjoining; lots 10, 12, 13, 14, and E. ½ lot 15; ⅓ of lots 8, 9, 16, and 17 in block 158, and did also convey to said Nash, by deed bearing date July 14, 1856, the following described lots in the Fifth ward of the city of Milwaukee, to wit: Lots 9, 10, and 11 in block 3, and lots 1, 2, and 3 in block 47, and received from said Nash his bond of indemnity against certain incumbrances upon said property for which this company was liable; and whereas said Nash afterwards conveyed the said premises to Moses Kneeland, substituting his bond of indemnity to this company for said Nash's, said Kneeland being at the time of such purchase and sale of said property a director in this company and member of the executive committee;

And whereas it has been charged that said Kneeland had an interest in the purchase of said premises by said Nash from this company, and that by reason thereof and by reason of said Kneeland's being at the time of such purchase a director and member of the executive committee of this company, the said Kneeland has only a trust estate in said premises, and whereas this company is desirous of perfecting the title to said premises in said Kneeland, his heirs and assigns:

Therefore *Resolved*, That the title, legal and equitable, of the said premises, and the deed conveying the same, be and are hereby confirmed in and to the said Kneeland, his heirs and assigns, so far as this company has any interest therein—

—were referred, reported the same back for the action of the Board, and the question being on the adoption, the preamble and resolution were adopted and so declared by the president, the vote being taken in the absence of Mr. Kneeland.

UNITED STATES OF AMERICA,
Eastern District of Wisconsin, } ss:

I, Edward Kurtz, clerk of the Circuit Court of the United States of America for the Eastern District of Wisconsin, do hereby certify that I have compared the foregoing with its original, now on file and of record in my office, and that the same is a true and correct copy of an exhibit offered in evidence upon the hearing of the suit of Lawrence G. Graham *et al. v.* The La Crosse and Milwaukee Railroad Company *et al.*

In testimony whereof, I have hereunto set my hand and duly affixed the seal of the said court at the city of Milwaukee, in said district, this 16th day of April, in the year of of Lord one thousand eight hundred and eighty, and of the Independence of the United States the 104th.

EDWARD KURTZ, *Clerk.*

[L. S.] By B. M. MILLER, *Deputy.*

UNITED STATES OF AMERICA,
Eastern District of Wisconsin, } ss:

I, Edward Kurtz, clerk of the Circuit Court of the United States of America for the Eastern District of Wisconsin, do hereby certify that I have compared the writings annexed to this certificate with their originals, now on file and remaining of record in my office, and that they are true copies of such originals, and correct transcripts therefrom, being copies of the deposition of Edward P. Whaling and Exhibits numbered (1), (2), (3), (4), (5), and (6), annexed thereto, and of the deposition of Stoddard Judd, taken in the suit of Newcomb Cleveland *v.* The La Crosse and Milwaukee Railroad Company *et al.*

In testimony whereof, I have hereunto set my hand and duly affixed the seal of the said court at the city of Milwaukee, in said district, this 16th day of April, in the year of our Lord one thousand eight hundred and eighty, and of the Independence of the United States the 104th.

EDWARD KURTZ, *Clerk.*

[L. S.] By B. M. MILLER, *Deputy.*

District Court of the United States for the District of Wisconsin.

Newcomb Cleveland	]	
vs.		
The La Crosse and Milwaukee Railroad Company, Selah Chamberlain, Moses Kneeland and others.	}	In Equity.

Depositions taken on behalf of the defendants Moses Kneeland and James Ludington, before Winfield Smith, one of the masters and commissioners of this court.

MONDAY, 1*st November*, 1858.

On this day appeared Mr. Carpenter, of counsel for the complainant; Mr. Palmer, for the defendants Kneeland and Ludington.

Edward P. Whaling, being recalled, (having been before sworn,) says:

I am secretary of the La Crosse and Milwaukee Railroad Company. I have the minutes of the proceedings of the executive committee of that company for the year 1855. I have also a copy of the by-laws of that company creating an executive committee. This paper, marked (1), is such copy.

(Witness produces the same, and it is hereto annexed, marked (1), and the same is offered in evidence by the defendant's counsel.

The complainant's counsel objects thereto, because it is secondary evidence.)

This paper, marked (1), is a true copy of the resolutions creating the executive committee.

This book now produced by me is the book of the minutes of the executive committee. It contains the proceedings of that committee for September 7, 1855. This paper, marked (2), is a true copy of two extracts from the proceedings for that day, showing the heading of the minutes for that day, and a resolution passed at that meeting. This paper, marked (3), is a copy of an extract from the minutes of the quarterly meeting of the board of directors, held October 17, 1855. I have looked in my office for the proposition of C. D. Nash, mentioned in paper marked (2), but I have been unable to find it.

(Witness produces papers marked (2) and (3), which are offered in evidence by the defendant's counsel, Mr. Palmer. They are objected to by Mr. Carpenter as secondary evidence.)

I have also a book containing the minutes of the proceedings of the executive committee in 1856. It contains the proceedings of a meeting of that committee, held July 11, 1856. This paper, marked (4), is a copy of extracts from those proceedings, showing the heading thereof, and a resolution passed at that meeting.

This paper, marked (5), is a copy of the minutes of the proceedings of the board of directors of the company, at their quarterly meeting, held July 16, 1856.

This paper, marked (6), is a copy of a portion of the proceedings of the board of directors of that company, at a meeting held 10th March, 1858.

(Papers marked (4), (5), and (6) are produced by the witness, and are offered in evidence by Mr. Palmer, the defendant's counsel. They are objected to by the counsel for the complainant as secondary evidence, and paper marked (6) is also objected to as immaterial and incompetent.)

I have here also the original articles of consolidation on file in my office, made between the La Crosse and Milwaukee Railroad Company and the Fond du Lac and Green Bay Railroad Company.

Cross-examined:

I was not the secretary of the company when these minutes and papers (except the copies) were made. I know nothing of the correctness of the original papers and minutes.

(Mr. Carpenter also objects to the papers marked (1), (2), (3), (4), (5), (6) and (7), that they are not, nor are the originals thereof, evidence for any defendants.)

This paper, marked (8), is a true copy of the original contract on file in my office between the La Crosse and Milwaukee Railroad Company and the Milwaukee, Fond du Lac and Green Bay Railroad Company, which original I have produced here.

EDWARD P. WHALING.

(Papers marked (7) and (8) offered in evidence by Mr. Palmer. They are annexed hereto.)

Papers referred to in Deposition of Edward P. Whaling.

(1) WEDNESDAY EVENING, *March* 30, 1853.

The board of directors met in their office at the village of Beaver Dam. Present: M. M. Strong, J. L. Bean, Byron Kilbourn, E. D. Clinton, Stoddard Judd, William Dawes, Abraham Ackerman, Hiram Barber, Francis Hubschman, and Joseph Kerr; M. M. Strong in the chair.

On motion, Stoddard Judd was appointed secretary *pro tem.*

Resolved, That an "executive committee," consisting of the president, acting director, and three other members of the board, be appointed, and the said committee shall hold their office during the pleasure of this board, any three of whom shall constitute a quorum for the discharge of any of their duties.

Resolved, That said committee shall hold their session on their own appointment, and the secretary of the board shall attend all their meetings and keep a fair record of all their proceedings, and present the same when required for the inspection of the board, and their proceedings shall be subject to the approval and confirmation of the board.

Resolved, That the executive committee shall, when this board is not in session, have power to fill any vacancy or vacancies which may occur in their own body, and also to appoint such agents or officers as the best interests of the company may require; and it shall be their duty to attend to and perform all and singular the duties required to promote and guard the interest of the company.

Resolved, That Stoddard Judd, William Dawes, and James Ludington constitute the other members of said committee.

(2) MEETING OF THE EXECUTIVE COMMITTEE,
FRIDAY EVENING, *September* 7, 1855.

Present: Messrs. President Judd, Kilbourn, Kneeland, Goodrich, Townsend.

Resolved, That the proposition of C. D. Nash, submitted in writing under date of 3d instant, for the purchase of property (real estate) in the 4th and 5th wards, be accepted.

(3) QUARTERLY MEETING OF THE BOARD OF DIRECTORS,
October 17, 1855.

Present at roll call: Messrs. Judd, Alden, Barber, Clin-

ton, Goodrich, M. Kneeland, R. S. Kneeland, Ludington, McFarland, Stevens, Strong, Smith—12.

Absent: Messrs. Kilbourn, Rose, and Townsend—3.

Minutes of the proceedings of the board at the last meeting were read and approved.

Minutes of proceedings of executive committee were read and approved.

(4) MEETING EXECUTIVE COMMITTEE, *July* 11, 1856.

Present: Vice-President Kneeland, Messrs. Townsend, Ludington, Goodrich.

Resolved, That the report of the vice-president in relation to the settlement of matters of difference between George H. Walker and the La Crosse and Milwaukee Railroad Company be accepted and approved, and the president is hereby authorized and directed to execute a deed of conveyance to C. D. Nash in accordance with the contract heretofore entered into between this company and said Nash.

(5) QUARTERLY MEETING, *July* 16, 1856.

Board of directors met, and there were present: Messrs. Kilbourn, Goodrich, Jenkins, Kneeland, Ludington, Townsend, and Rose—7.

Absent: R. S. Kneeland, McFarland, Stevens, and Strong—4.

Petition of Ozier Clark in reference to certain covenants in his deed of right of way was referred to the attorney of the company, with instructions to report to the executive committee.

Minutes of meetings of board from April 16 to date read and approved.

Minutes of executive committee for same period were read and approved.

Treasurer presented a report, which was referred to executive committee, together with a letter from H. Alden making certain suggestions. Board adjourned.

The board of directors of the La Crosse and Milwaukee Railroad Company met, pursuant to adjournment, at the office of the company, in the city of Milwaukee, at three o'clock in the afternoon of Wednesday, March 10, 1858.

Directors present:

Edwin H. Goodrich,	Byron Kilbourn,
Jackson Hadley,	George W. Luther,
Moses Kneeland,	H. L. Palmer, and
Eli Perry,	Stephen Clark, president.

Directors absent:

Artemas Fish,	S. H. Alden,
D. V. N. Radcliff,	Alfred Naxon, and
	David E. Wheeler.

The committee, consisting of Messrs. Clark, Perry, and Luther, to whom the following preamble and resolution, to wit:

Whereas this company did, by deed bearing date September 8, 1855, sell and convey unto Charles D. Nash the following described real estate, situate in the Fourth ward of the city of Milwaukee, to wit: Lots 1, 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, and 14, in block 155; lots 1 and 4, block 156; one-eighth block 157, except lot 8, with the bayou adjoining; lots 10, 12, 13, 14, and E. one-half lot 15; one-third of lots 8, 9, 16, and 17 in block 158; and did also convey to said Nash, by deed bearing date July 14, 1856, the following described lots in the Fifth ward, in the city of Milwaukee, to wit: Lots 9, 10, and 11 in block 3, and lots 1, 2, and 3 in block 47, and received from said Nash his bond of indemnity against certain incumbrances upon said property, for which this company was liable; and whereas said Nash afterwards conveyed the said premises to Moses Kneeland, substituting his bond of indemnity to this company for said Nash's, said Kneeland being at the time of such purchase and sale of said property a director in this company and a member of the executive committee;

And whereas it has been charged that said Kneeland had an interest in the purchase of said premises by said Nash from this company, and that by reason thereof, and by reason of said Kneeland's being at the time of such purchase a director and member of the executive committee of this company, the said Kneeland has only a trust estate in said premises; and whereas this company is desirous of perfecting the title to said premises in said Kneeland, his heirs and assigns; therefore

Resolved, That the title, legal and equitable, of the said premises, and the deed conveying the same, be and are

hereby confirmed in and to the said Kneeland, his heirs and assigns, so far as this company has any interest therein—

—were referred, reported the same back for the action of the board, and the question being on the adoption, the preamble and resolution were adopted, and so declared by the president; the vote being in the absence of Mr. Kneeland.

District Court of the United States for the District of Wisconsin.

Newcomb Cleveland	
vs.	In Equity.
The La Crosse and Milwaukee Railroad Company *et al.*	

Depositions taken on behalf of defendants Moses Kneeland and James Ludington, before Winfield Smith, one of the masters and commissioners of this court.

THURSDAY, 4th *November*, 1858.

Stoddard Judd, being duly sworn, says: I reside in Fox Lake, Dodge county, Wisconsin. I was elected a director in the La Crosse Company in the Spring of 1853, and continued in the board of directors until February, 1856. I was president of the company from October, 1853, until February, 1856. I was acquainted with the property sold by the company to Nash in 1855. I was not intimately acquainted with it, but I knew it, and went down with a map and looked at it. I think the consolidation between the La Crosse and Fond du Lac Companies took place in January or February, 1854. The La Crosse Company acquired the title to this real estate sold to Nash by means of this consolidation. Previous to that time the property had belonged to the Fond du Lac Company.

Question. What use had the La Crosse Railroad Company for this property?

(Objected to as immaterial.)

Answer. None at all, as connected with the construction or operation of the road which we were then building, or intending to build. I was, while president, also a member of the executive committee of that company. I was pres-

ent at the time Mr. Nash's proposition to purchase the property was acted upon by the committee. A resolution, of which the paper hereto annexed, marked (2), and now shown me, was passed at that meeting. Messrs. Kilbourn, Moses Kneeland, Goodrich, Townsend, Ludington, Clinton, and myself, composed the committee at that time. All were present except Messrs. Ludington and Clinton. I have no recollection that Mr. Ludington was present at that time, but I cannot say that he was not. I looked over that property several times to see its location and condition and value.

Q. Was the property sold to Nash described as follows: Block 47, lots 1, 2, and 3; block 3, lots 9, 10, 11; all the lots in block 155, except lot 3; lots 1 and 4, in block 156; one-eighth of block 157, except lot 8; one-eighth of the bayou adjoining block 157; one-third of lots 8, 9, 16 and 17, in block 158; lots 10, 12, 13, 14, and the east half of lot 15, in block 158?

A. I don't know that I can swear positively that this was the description. I think it was. His proposition covered and we sold to him all the property we got by the consolidation in the Fourth and Fifth wards. I think the price was $25,000; $10,000 in farm mortgage bonds, such as had been issued by our company, and the balance, $15,000, by the return to us of that amount of the capital stock of the company. The $10,000 in bonds were paid. The stock was not to be paid until the termination of a chancery suit against the company by George H. Walker. Another condition of the sale was that Nash was to take a quit-claim deed from the company, and to take it subject to a mortgage of $4,000, which the Fond du Lac Company had executed to Edward D. Holton, I think, and another mortgage of $800, I think, which the company had executed to a man named Lee. Some interest was due on each of these mortgages, in addition to these amounts.

(The complainant's counsel objects to parol proof of the terms and conditions of the contract between the company and Nash.)

There was outstanding a tax title on some of the property; I don't know how much.

(The complainant's counsel objects to parol proof of the existence of tax titles upon the property.)

I think the $15,000 in stock was not paid during my connection with the company. I have no other means to judge of the value of the property than by the amount we could get for it.

Q. What, in your judgment, was the value of the property in September, 1855, and what are the reasons for your opinion?

(Objected to by the complainant's counsel because the reasons are immaterial, and because the question calls for a great deal of improper testimony, which could not be admitted upon direct interrogatories.)

A. As the property was then situated, I think that the full value of the interest of the company was $20,000 in cash. The reasons are the incumbrances then upon it, which I have mentioned, and there were two claimants of adverse titles to a part of this land, one named Cunningham and one named Moore, who had presented counter-titles. There were a large number of tax certificates of sale against it, requiring for redemption some $500 to $800. Suits were, I think, commenced on behalf of these adverse owners. One certainly was commenced by Walker, and Moore and Cunningham had commenced or threatened suits, and a more material reason than all these was that I and other members of the committee had been looking for purchasers of the property unsuccessfully. One man had offered $18,000, but not cash. Mr. Goodrich and Mr. Ludington had been directed by the executive committee to find a purchaser, and also to investigate the title, which they did. Several of the land agents in town knew of the property being for sale. No better offer being made, and the property being costly to keep for the company, I thought then, and still think, that our sale was advantageous to the company, considering the title we gave. The executive committee all considered it a good sale, and I have always thought it so.

(The complainant's counsel moves to strike out the foregoing answer as not responsive to the question, and as immaterial and improper testimony.)

Q. Did you offer that property to any other person in the summer of 1855, and if so, to whom did you offer it, at what price, and upon what terms?

(Objected to as immaterial.)

A. I did offer it to several persons. I offered it to C.

D. Cook for $20,000, in part payment of his debt against the company. I offered it to Mr. Mariner for $25,000 on time. He finally made me an offer, but not near that amount. I offered it to James B. Cross at $25,000, which was our asking price during the whole season. I believe I offered it to Mr. Goodrich also. I think I talked with Mr. Flanders and Mr. James Kneeland about selling it to them.

Q. Were any of these persons willing to take it?

(Objected to as immaterial.)

A. None of them were willing. Mr. Mariner was the only person who made a proposition then for it, that I remember.

Q. Do you know what the Fond du Lac Company gave for that property?

(Objected to as immaterial.)

A. I think I do know. I did know, but I do not know that I can state positively. They agreed to give, I think, about $25,000, but had not paid it all, as there were some mortgages given by them still unpaid, as I have mentioned. The three lots, 9 10, and 11 in block 3, and 12 and 3 in block 47, in the Fifth ward, were bought of Walker.

Q. What kind of payment did the Fond du Lac Company make for the property?

(Objected to as immaterial.)

A. I do not know of my own knowledge.

Cross-examined:

I have never resided with my family in Milwaukee. I made this my principal stopping-place while I was president of the road. I was not engaged in buying and selling real estate. I bought a house and lot or two. I was also engaged to some extent in buying lots for the use of the company for depot grounds. I was not acquainted generally with the value of real estate in this city, so as to form a reliable judgment about it. I think the property sold to Nash would have been worth in September, 1855, free from all incumbrances and question as to title, forty thousand dollars, about. James Ludington was a member of the executive committee when the property was sold. He was consulted about the purchase, and so was Mr. Moses Kneeland. Both of them advised and consented to it. So

did Mr. Goodrich. No person opposed it. I did not know, and I had no suspicion at the time of the sale, that either Ludington, Kneeland, or Goodrich was to be interested in the property sold to Nash. I did not know that either of them was to or did furnish any part of the consideration for that purpose. I don't know that it was known to any other member of that board. At the time of the sale, I had no suspicion that any member of the board was to be interested in the purchase, nor did I have until a long time afterwards. I have no recollection of any person, except Mr. Mariner, having made an offer for the property. I think Mr. Mariner was not then attorney for the company. I think Mr. Cook was not vice-president of the company when the property was offered to him. I am confident he had resigned before that time.

Re-examined:

Q. At the time of the sale to Nash, was he required to give to the company, as part of the consideration of the property, a bond to indemnify the company against the incumbrances on it?

(Objected to as immaterial, and as secondary evidence.)

A. I think he was required to give such a bond, and did so.

Q. Did Kneeland afterwards apply to you to take up Nash's bond and substitute his own for it? and was that done?

(Objected to as immaterial and secondary.)

A. He did apply, and it was accordingly done. I have no definite recollection of the amount of taxes. I recollect one bill, I think, of over $800. I do not recollect that any person signed the bond with Mr. Nash. We supposed him to be a man of property at that time.

STODDARD JUDD.

Supreme Court of the United States

OCTOBER TERM, 1880.

No. 33.

LAWRENCE G. GRAHAM and DONALD D. SCOTT,
Appellants,

vs.

THE LA CROSSE AND MILWAUKEE RAILROAD COMPANY and others.

MATT H. CARPENTER,
NEWTON S. MURPHEY,
Of Counsel.

Thomas McGill & Co., Printers, Washington, D. C.

Supreme Court of the United States.

OCTOBER TERM, 1880.—No. 33.

LAWRENCE G. GRAHAM AND DONALD D. SCOTT,
APPELLANTS,

vs.

THE LA CROSSE AND MILWAUKEE RAILROAD COMPANY AND OTHERS.

This is an appeal from a decree of the Circuit Court of the United States for the Eastern District of Wisconsin, in equity, dismissing the bill of complaint brought by the complainants and appellants to subject certain real estate in the city of Milwaukee to the satisfaction of a judgment in favor of the complainants against the La Crosse and Milwaukee Railroad Company.

The bill sets out the recovery of two judgments by the complainants against the La Crosse and Milwaukee Railroad Company in the Circuit Court for the county of Milwaukee, in the State of Wisconsin, and the issuance of executions thereon, which were levied upon the real estate in question; that afterwards these judgments were sued over in the District Court of the United States for the District of Wisconsin, where the complainants recovered judgment for the sum of forty-four thousand three hundred and ninety-two dollars and thirty-two cents ($44,392.32), besides costs, which was docketed in said court on the 11th day of January, 1860; that execution issued thereon, which was duly levied upon the real estate in question. The bill then sets forth, that although the property belongs to the

judgment debtor, the La Crosse and Milwaukee Railroad Company, yet an obstacle existed in the way of the sale of the property on the execution growing out of the former fraudulent conveyance made by the directors of said company in fraud of the stockholders and creditors of the company, which the bill asks to have removed; and the bill prays that the complainants' judgment may be declared to be a lien upon the property, and that said property may be sold to satisfy said judgments.

The bill shows that "the property in question was in 1855 owned by said railroad company, and that Moses Kneeland, Byron Kilbourn, and James Ludington were three of the directors of said company, and that said Kneeland and Ludington were appointed by the board of directors, or by the executive committee of the board, (which board was composed of Kilbourn, Kneeland, and others,) a committee to sell and dispose of said lands, worth at the time, as they knew, more than one hundred thousand dollars ($100,000); that the said Kilbourn and Ludington, then and there designing and intending to injure and defraud said company and its creditors, and disregarding their duties as directors as aforesaid in the premises, and intending unlawfully and fraudulently to acquire to themselves and said Kilbourn or some other person or persons, by a violation of their duties as directors as aforesaid, the said lands for a grossly inadequate price, did sell and transfer said lands, worth, as they then and there well knew, more than one hundred thousand dollars ($100,000), to one Charles D. Nash, for the nominal consideration of twenty thousand dollars ($20,000) in bonds or stock of said company defendant; and that said Kilbourn, said Kneeland, and said Ludington, or one of them, furnished to said Nash, directly or indirectly, whatever the said Nash pretended to pay to said company for said lands; and that said sale was made to said Nash with a fraudulent, secret

arrangement and understanding between said Nash, said Kilbourn, said Kneeland, and said Ludington, or some of them, that said Nash should thereafter, when requested by said Kilbourn, Kneeland, or Ludington, convey and transfer said lands to said Kneeland, said Kilbourn, or said Ludington, or for the benefit of said Kilbourn, Kneeland, and Ludington, for a nominal or no consideration; and that said Nash was wholly disinterested in said pretended sale to him of said lands, and that soon after the conveyance of said lands to said Nash, that said Nash did, in pursuance of said fraudulent and corrupt arrangement hereinbefore stated, convey and transfer said lands to said Kneeland for no consideration, or for a nominal or pretended consideration."

The bill further shows that "soon after the conveyance aforesaid to him, the said Kneeland conveyed and transferred to said Ludington one-third of said land for no consideration, but really in pursuance of said corrupt agreement, and that the said Kneeland now holds a record title to two-thirds of said land for himself and the said Kilbourn; that the said Kneeland, said Kilbourn, and said Ludington pretend to hold these lands as aforesaid, which are worth more than two hundred thousand ($200,000) dollars, in fraud of your orators' rights as creditors of said company-defendant, and by reason of a violation of their duties as directors as aforesaid and trustees of this same property, and that the same ought to be applied to the payment of your orators' said judgment, and that said conveyance made as aforesaid, and on record, of the lands hereinbefore described, and upon which said writ of *fieri facias* has been levied, are a cloud upon your orators' right to sell said lands on the writ of *fieri facias* issued in their favor as aforesaid, and an impediment in the way of the execution of said writ; and that said Mariner, defendant, claims and pretends to have some right to and interest in said lands;

but your orators show that the said Mariner bought his interest, if he has any in said lands, with full notice of the matters and things hereinbefore set forth and not *bona fide*, and now holds the same for the benefit of said Kilbourn or some other person, in fraud of your orators' rights as creditors as aforesaid."

The following is an abstract of the answer filed to said bill by Moses Kneeland, since deceased:

1. He admits recovery of judgment as charged.

2. Denies that La Crosse and Milwaukee Railroad Company was, on September 8, 1855, or at any time, seized in fee of lot 13 in block 158, in Fourth Ward, or that it had any title therein; denies that said company was seized in fee of more than undivided ½ lot 10 in block 158.

Admits said company was seized September 8, 1855, of lots 1 and 4, block 156; of 4, 7, and 10, block 155, and of 12, 14, and east ½ of 15, block 158, Fourth Ward, subject to taxes for years 1838, 1840, 1851, 1852, 1853, and 1854, and subject to mortgage executed by Milwaukee and Fond du Lac and Green Bay Railway Company to E. D. Holton for $4,000, and interest at 8 per cent. for purchase-money, which was assigned to Bridgeport Savings Bank. That December 13, 1858, bank brought suit in Circuit Court, Milwaukee county, against complainants, defendants and others, to foreclose. Judgment, sale, &c.; bid in by bank.

3. Further admits that company was seized September 8, 1855, in fee of lots 1, 2, 5, 6, 8, 9, 11, 12, 13, and 14, in block 155, except that several of said lots had been sold and *deeded* for taxes, and subject to *sales* for taxes for 1851, 1852, 1853, and 1854, and lots 13 and 14 were subject to a mortgage by Milwaukee and Fond du Lac and Green Bay Railroad Company, to John B. Lee, for purchase-money, about $900. Admits said company September 8, 1855, held title to undivided ⅛ block 157, subject to taxes for years 1851, 1852, 1853, and 1854. Does not know and

cannot say if company was seized of undivided ⅛ of bayou, now partitioned by law, between east side block 157 and channel and bank of Milwaukee River; that a *person* claiming said premises under grant from original owners brought suit against lessees of defendants; suit then pending.

Admits company seized September 8, 1855, of legal title to lots 9, 10, and 11 in block 3, and lots 1, 2, and 3 in block 47, Fifth Ward, subject to taxes for 1853 and 1854; charges on information that Joseph D. Doty then claimed to be the owner as grantee from United States.

That prior to September 8, 1855, G. H. Walker had conveyed said lots; company brought suit to set aside conveyance. (Does not say what come of that suit.) That La Crosse and Milwaukee Railroad Company derived its title by consolidation with Milwaukee, Fond du Lac and Green Bay Railroad Company. That title to lots questionable and intricate, and incumbered with mortgages and *taxes* to amount of $4,000; land had been sold and certificates of sale issued, claiming interest at 25 per cent. That said premises, except lots in block 3 and front 50 feet of lots in block 158, and platted adjacent streets, were covered with water from 6 to 12 feet; *all* lots required *filling* and block 155 *docking* before they could be used at all, which would have cost $30,000 or $35,000; that company had no authority or money to fill lots and dock. No money which company was *at liberty to use to pay taxes and incumbrances.* That in fall of 1854 and spring of 1855, company offered land at $18,000 to $28,000, according to terms, &c., of payment; that in August or September, 1855, defendant notified C. D. Nash of terms, and requested him to buy some for defendant, Nash, and C. D. Cook (then deceased).

Admits Nash made purchase as charged in bill, and upon termination of Walker's suit; and company executed and delivered to Nash a quitclaim of lots in Fourth Ward, an agreement in writing for sale of lots in Fifth Ward, should the same be adjudged property of company; copy of agree-

ment annexed marked "Exhibit A," and Nash thereupon paid $10,000 in farm mortgage bonds; denies advising company to make sale, except generally to sell to any one; that terms of sale he got from Dr. Judd; denies that lots were worth more than what Nash paid; denies intention to defraud company; (says nothing of creditors;) and denies violating his duty as an officer.

Admits he loaned Nash farm mortgage bonds to make purchase, and took his due bill therefor, but did not lend them with design to defraud.

That Nash and Cook, after examining title, wished no interest. Defendant took Nash's purchase quitclaim deed of premises in Fourth Ward, and assignment of contract to lots in Fifth Ward, and gave to Nash his due bill. Afterward, in October, 1855, Ludington paid defendant his proportion of money for lots, and defendant conveyed one-third to him; at the same time Kilbourn paid defendant his share, and he conveyed to him one-third of lots. Afterward defendant negotiated a settlement of Walker's suit and perfected title, and company quitclaimed to Nash in performance of said agreement, and these defendants paid said $15,000 (interlined.)

Admits that on September 8, 1855, when Nash bought lots, Kneeland and Ludington were directors of the company; that at date of conveyance from company to Nash, company was not indebted to complainants.

Had been in possession under conveyance uninterrupted since, except by N. Cleveland; had made valuable improvements, docking and filling, &c., to the amount of $15,000, with knowledge and consent and without interruption by company.

That on March 7, 1858, company, with full knowledge of the facts, ratified sale by resolution.

Denies all confederacies, &c.; and all other things charged not answered or admitted by him, is thereby admitted.

The answers filed by James Ludington and Ephraim

Mariner, were substantially the same as that of Moses Kneeland.

On April 23, 1864, suggestion of death of Moses Kneeland filed, and leave granted to revive suit against his heirs or representatives, and September 12, 1864, bill of revivor was filed (and process duly served) against James Kneeland, administrator of the estate of said Moses Kneeland, deceased, and the other original defendants, in which the death of Kneeland is charged as occurring February 1, 1864. (Pp. 27, 28.)

Afterwards, on the 14th day of September, 1868, the complainants filed, by leave of the court, a supplemental bill against the Milwaukee and St. Paul Railway Company, in substance alleging the same general facts charged in the original bill, and in addition thereto, that after the commencement of this suit, the defendant, the Milwaukee and St. Paul Railway Company, with full notice and knowledge of the facts stated in the original bill, for no consideration, or some nominal consideration, the particulars of which were unknown to the complainant, took a conveyance of all the real estate described in said original bill from Kilbourn, Kneeland, Ludington, Nash, Mariner, or some or one of them, and then held the same free of the rights of the complainant, as creditors of the La Crosse and Milwaukee Railway Company, claiming the same rights to said property as against said Milwaukee and St. Paul Railway Company that they would have had against the said Kneeland, Kilbourn, Ludington and Mariner, and concluded with the usual prayer.

To this supplemental bill, the St. Paul Railway Company, September 8, 1869, filed an answer in substance alleging that it admitted that in the year 1864 it purchased and became the owner of the following described lands, to wit: all of block 155, except lot 3; lots 1 and 4 of block 156; $\frac{1}{8}$ part of the bayou, so called, lying west of Reed street; $\frac{1}{8}$ of block 157, except lot 8; $\frac{1}{3}$ of lots 8, 9, 16

and 17 of block 158; and lots 10, 12, 13 and 14 and the east half of 15, of block 188, in the Fourth Ward; and lots 1, 2 and 3, of block 47 in the Fifth Ward of Milwaukee, being a part of the premises described in said bill of complaint, and claims that the consideration was paid to its grantors, amounting to over $54,000; that said purchases were made of Daniel Wells, Jr., and wife, James Ludington, John G. Flint and wife, James L. Sexton and wife, Francis Kneeland, State Bank of Wisconsin, Charles K. Wells and wife, Clark Shepardson and wife, James K. Warner and wife, Edwin H. Goodrich, James Kneeland and wife, John W. Pixley, and Jerome R. Brigham and wife. Said defendant, however, denied that it took said conveyance with full or any notice or knowledge of the facts stated in said supplemental bill, or that any notice or knowledge thereof whatever, or that it took the same without any consideration.

It further answers, that on the 8th of September, 1855, the La Crosse and Milwaukee Company was the owner of an interest in the whole or a part of said premises, subject to several liens and incumbrances; and that on or about said day, said La Crosse and Milwaukee Railroad, in consideration of $25,000 to it paid by Charles D. Nash, conveyed by a quitclaim deed all its right, title, and interest in said lots to Charles D. Nash, and that was all the land was worth. And that afterwards, on the 24th of September, 1855, said Nash, by quitclaim deed, in consideration of $15,000, conveyed said lands to Moses Kneeland. And that on the 31st day of October, 1855, in consideration of $5,000, said Moses Kneeland conveyed by quitclaim deed one-third of said lands to James Ludington; that on the 10th of April, 1857, said Moses Kneeland, by a quitclaim deed, conveyed one-third of said lands to Edwin H. Goodrich; and that said Edwin H. Goodrich afterwards, on the 18th of November, 1857, conveyed all the interest so acquired by him to Ephraim Mariner.

It further alleges, that at the time of the conveyance to Nash the Bridgeport Savings Bank held a mortgage given by the Milwaukee, Fond du Lac and Green Bay Railroad Company, for the purchase-money thereof, on lot 1, block 156; lots 4, 7, and 10 of block 155; lots 12, 14, and east half of 15 of block 158; that said mortgage was foreclosed in the Circuit Court of Milwaukee county, the complainants being parties defendant thereto; and said lots were sold to the defendant on February 7, 1860, for $4,090; and that this defendant now holds said lots as the grantee of the bank and of certain tax titles.

And it further alleges, that on the 24th of May, 1859, the board of directors of the La Crosse and Milwaukee Railroad Company, by resolution, ratified the sale of said lands to Nash, and confirmed the same.

The answer further claims that the Milwaukee and St. Paul Railway Company purchased most of said lots, taking conveyances from the owners thereof to Russell Sage, as its trustee, who afterwards conveyed them to the defendant; and that prior to the conveyance to Sage some part of the lands had been sold for taxes, and tax titles had accrued thereon, and were held severally by Daniel Wells, Jr., State Bank of Wisconsin, Charles K. Wells, Clark Shepardson, James Warner, John W. Pixly, and Jerome R. Brigham, from whom it claims to have derived a valid title, and further claims possession of the premises under such deeds for more than three years before the filing of said supplemental bill, and alleges that it has put valuable improvements upon the premises since it has purchased them. (Record, pp. 31 to 38.)

July 2, 1872, supplemental bill filed against the heirs of Moses Kneeland, parties defendant, and praying for a general accounting as to the proceeds of sale alleged to have been received by said heirs from the sales of Moses Kneeland's interest in said land. (Pp. 40–43.) Plea to this bill of the statute of limitations by the heirs of Knee-

land, filed September 24, 1872, which was set down for hearing on the plea, and the plea was "sustained and allowed, so far as said bill seeks to charge and obtain from said defendants a personal account." (Pp. 45, 46.)

November 13, 1863, cause as to defendant Mariner was dismissed. (Pp. 28, 29.)

October 26, 1872, motion of complainants to vacate order of dismissal as to Mariner denied without prejudice to renew motion on hearing. (Pp. 47, 48.)

On hearing, motion renewed and granted. (P. 321.)

Abstract of Evidence.

The facts established by the evidence are as follows:

On the 8th day of September, 1855, the La Crosse and Milwaukee Railroad Company was the owner in fee of the property described in the complaint; and on that day Moses Kneeland, James Ludington, Byron Kilbourn, and Edward H. Goodrich were members of the board of directors of said company, and C. D. Cook was vice-president of the said company. And Moses Kneeland, Byron Kilbourn, and Edwin H. Goodrich were members of the executive committee of the said board.

Record, pp. 78, 79.

On the 8th of September, C. D. Nash entered into a written contract for the purchase of that part of said property lying in the Fifth Ward, in the city of Milwaukee, for the nominal consideration of fifteen thousand ($15,000) dollars, payable in the capital stock of the company at its par value.

Previously, on July 18, 1855, Nash had made a written proposition to the La Crosse Company, which he says was accepted about that time, to purchase the entire property in the Fourth and Fifth Wards for the nominal consideration of twenty-five thousand ($25,000) dollars, payable ten thousand ($10,000) dollars in farm mortgages of the La

Crosse Company and fifteen ($15,000) dollars in its capital stock. In pursuance of these contracts, all the property in question was conveyed to Nash.

Exhibit (1), Nash's evidence, pp. 195, 196.
Paper B, pp. 197 and 198.
Supplemental Record, pp. 10, 11.
Record, pp. 238, 239.

The testimony of Nash shows that he purchased for the benefit of Kneeland and Ludington, although he says it was understood he might have an interest in the purchase if he should subsequently elect so to do; but subsequently he elected not to take an interest, but conveyed the whole property to Moses Kneeland without consideration.

Record, pp. 50–60, 93, 95.

Kneeland states in his answer that he conveyed one-third of this property to Kilbourn.

Record, p. 14.

Goodrich testifies that he purchased Kilbourn's third and paid Kilbourn for it, but does not recollect from whom he received the deed, but he found the note which he gave to Kilbourn for the third interest.

Record, pp. 188 and 189.

But the record shows the deed from Kneeland to Goodrich of this third interest.

Record, p. 240.

Goodrich also testifies (Record, p. 189) that the sale to Nash was negotiated and made by the executive committee of the board of directors.

Record, p. 189.

The testimony of Nash (Record, p. 199) shows that six-

teen days after his purchase, to wit, September 24, 1855, he assigned all his interest to Kneeland without consideration, and executed and delivered to Nash, on that day, (Exhibit No. 3; Nash's evidence, pp. 199 and 200; and papers A and B, annexed, pp. 101 and 102,) a bond of indemnity, to protect him against his covenants and obligations growing out of the purchase.

Nash also testified that all the consideration which he paid for the purchase of the property was furnished to him by Kneeland, and that he understood the purchase made by him was for the benefit of Kneeland and Ludington, although he is not positive as to Ludington.

Record, p. 55.

Goodrich swears that he understood, at the time the sale to Nash was made, that it was made for the benefit of Nash and C. D. Cook.

Record, p. 188.

Cook was at that time vice-president of the company.

Record, pp. 78 and 79.

September 24, 1855, Nash and wife conveyed all these lots to Moses Kneeland.

Record, pp. 199 and 237.

October 31, 1855, Moses Kneeland and wife conveyed one entire third of these same lots to James Ludington.

Record, p. 238.

April 10, 1857, Moses Kneeland and wife conveyed one undivided third of the same property to Edwin H. Goodrich.

Record, p. 240.

November 18, 1857, Goodrich and wife conveyed said third interest to defendant Mariner.

Record, pp. 241, 242.

This last deed was not recorded until August 5, 1864, four years after this bill was filed.

When this suit was brought, June 2, 1860, the title to this property stood as follows:

One-third in Kneeland, one-third in Ludington, and one-third in Mariner, although the deed to Mariner was not on record.

In the year 1864, Kneeland, Ludington, and Mariner agreed to convey to the Milwaukee and St. Paul Railroad Company the lots so held by them for $54,000, to be received in equal proportions by them.

July 1, 1864, Mariner conveyed his third to Russell Sage, as trustee for the St. Paul Company, for eighteen thousand dollars ($18,000), (Record, pp. 247, 248,) and Goodrich, to make good Mariner's title, also conveyed by quitclaim.

Record, pp. 250, 251.

August 1, 1864, Ludington conveyed to Sage, as such trustee.

Record, p. 252.

July 2, 1864, Moses Burr Kneeland, infant son and heir of Moses Kneeland, conveyed to Goodrich his interest as heir at law of Moses Kneeland.

Record, p. 249.

Burr Kneeland was one of four heirs at law of Moses Kneeland, deceased.

Record, p. 40.

The other heirs of Moses Kneeland do not appear to have conveyed their interest in Kneeland's third of this property to the St. Paul Company.

August 3, 1864, Russell Sage conveyed to the St. Paul Company the title acquired by him from said conveyance, and the company is now in possession of said premises.

Record, p. 253.

A portion of the lots that Nash purchased were incumbered by a mortgage for four thousand ($4,000) dollars, drawing 8 per cent. interest, executed by the Fond du Lac and Green Bay Railroad Company (the corporate predecessor of the La Crosse Company) to E. D. Halton, dated August 27, 1853, and another by the same company to John B. Lee, dated September 12, 1853, for eight hundred ($800) dollars, with ten per cent. interest, which Nash, by contract with the La Crosse Company, September 8, 1855, (Record, p. 197, paper A,) promised to assume and pay as a part of his consideration to purchase.

The four thousand dollar mortgage came into the hands of the Bridgeport Savings Bank, and was presented to Moses Kneeland, James Ludington, and Ephraim Mariner for payment, who declined to pay because, as they said, a question had been raised as to the validity of the title they held, as before set forth. They agreed with the attorneys of the bank that if the mortgage was foreclosed and the title of the La Crosse Company and its creditors thus cut off, they would buy it in on the sale, or have it done, for the amount due on the mortgage, with costs, and this arrangement was accepted and carried out, and the property bought in by the bank, to which conveyance was made February 11, 1860.

Record, p. 243.

On April 10, 1860, the bank for four thousand and

ninety dollars ($4,090) consideration conveyed the same to Kneeland, Ludington, and Mariner, (pp. 244, 245,) taking back a mortgage from Kneeland, Ludington, and Mariner for the four thousand and ninety dollars ($4,090), (pp. 245, 246,) which they subsequently paid. (The record of foreclosure is found on p. 255.)

Mariner testifies to this arrangement.

Record, pp. 105–108, 6, 7, 8, 11, 64, 65, 73.

The other eight hundred dollar mortgage given to Lee was paid by Kneeland, Ludington, and Mariner.

Record, p. 112.

The St. Paul Company became a corporation May 5, 1863, and on that day the following named persons were elected a board of directors: David M. Hughes, N. A. Cowdry, Ashael Finch, F. P. James, William H. White, and others, to hold until June, 1865. On the same day David M. Hughes was elected president, and William H. White vice-president for the same term.

In the month of June following the board of directors was increased to thirteen, and George W. Rogers, C. Chamberlain, Alexander Mitchell, and Russell Sage were elected additional directors, to hold until June, 1865.

June 25, 1863, William H. White resigned as director and vice-president, and on the same day A. Noxon was elected director and George W. Rogers vice-president to fill vacancies caused by the resignation of White.

November 14, 1863, George W. Rogers resigned his position as vice-president, and Russell Sage was elected to fill the vacancy.

June 21, 1864, D. M. Hughes resigned the office of president, and July 1, 1864, Russell Sage was elected president,

to hold until June, 1865, and resigned the office of vice-president.

Record, pp. 152, 153.

At the annual election of the directors of the La Crosse and Milwaukee Railroad Company, held February 7, 1855, Moses Kneeland, Edwin H. Goodrich, James Ludington, and Byron Kilbourn were elected directors, to hold one year, and C. D. Cook was elected vice-president of the company, to hold for a like term. At the same meeting Moses Kneeland, Edwin H. Goodrich, and C. D. Cook were elected members of the executive committee of the said board.

Record, pp. 78, 79.

September 7, 1855, at a meeting of the executive committee of the board of directors of the La Crosse Company, (consisting of Ludington, Kilbourn, Kneeland, Goodrich, and two others,) Nash's proposition to purchase the property in question was accepted.

Supplement to Record, p. 10.

October 17, 1855, at a quarterly meeting of the board of directors of the La Crosse Company, at which Goodrich, Kneeland, and Ludington, as directors, were present, the minutes of proceedings of the executive committee of September 7, 1855, were read and approved.

Ibid., pp. 10, 11.

July 11, 1856, at a meeting of the executive committee of the board of directors of the La Crosse Company, (consisting of Vice-President Cook, Kneeland, Ludington, Goodrich, and Townsend,) the La Crosse Company was directed to execute a deed of conveyance to said Nash, in accordance with the terms of the contract before set forth.

Supp. Record, p. 11.

July 16, 1856, at a quarterly meeting of the said board of directors, at which Kilbourn, Kneeland, Goodrich, and Ludington were present and constituting a majority of said board, the minutes of the executive committee of said board of July 11, 1856, were approved.

Ibid., p. 11.

Actual notice of the pendency of this suit, and of the alleged frauds in connection with the disposition of the property described in the bill, is further brought home to Kneeland, Ludington, Goodrich, Mariner, and the St. Paul Company, as the following facts show:

In the District Court of the United States for the District of Wisconsin, Newcomb Cleveland filed a bill against the La Crosse Company, Byron Kilbourn, its president, Moses Kneeland, James Ludington, D. C. Freeman, Charles D. Nash, and C. Chamberlain, directed, among other things, against the property in question here, and frauds and irregularities complained of in this case.

Record, pp. 270 to 280, inclusive.

The bill in the Cleveland case was verified and filed October 31, 1857.

Record, p. 280.

Kilbourn's answer was verified December 4, 1857.

Record, pp. 281 to 289, inclusive.

The bill in the Cleveland case was pending and a *lis pendens* when the bill in this case was filed.

James Ludington's answer in that case is found on pages 291 to 299 of this record.

Mariner was made a defendant in the Cleveland suit, and answers showing knowledge of all the fraud charged at that time.

Record, pp. 299, 300.

In his answer in the Cleveland case he admits having read the charges of fraud in the complainant's bill in that case, and the proofs on file to sustain them.

His testimony in this case shows personal knowledge of the fraud.

Record, pp. 104 to 111.

The bill in this case filed June 2, 1860, was thenceforth a *lis pendens*.

Finch, Lynde, and Miller were in 1864 the attorneys of the St. Paul Company, and examined and gave an opinion as to the title that the company bought in that year from Kilbourn, Ludington, and Mariner.

Mr. Asahel Finch, the senior member of that law firm, was a director of the St. Paul Company for a year or more, but he is unable to say just what time, but that he had knowledge of the pendency of this suit at all times after it was brought, and carried a proposition to Graham, by direction of Sage, the president of the St. Paul Company, to pay sixty thousand (60,000) dollars in the stock of the company for complainant's judgments, and in settlement of this suit.

Record, pp. 141, 150.

By Mr. FINCH:

"Q. Did you know about the judgment at the time you were a director in the St. Paul Company?

A. Yes, sir; I knew about the judgment.

Q. State whether you knew at that time of the pendency of the bill by Graham and Scott in the United States court.

A. I have already said that I knew they had a bill pending against the La Crosse road.

Q. At the time of your directorship?

A. Yes.

Q. State, Mr. Finch, whether at any time during your directorship in the St. Paul Company—and if so, when—you were directed by any of the officers of the St. Paul Company—and if so, by whom—to go to Graham and

Scott to purchase that judgment, *with a view to settling that suit in equity.*

A. I was requested by Russell Sage to go to Mr. Graham, this gentleman [pointing to Mr. Graham], to make him an offer of sixty thousand dollars ($60,000) of stock in the St. Paul Company for his judgment.

Q. Did you do so?

A. I did. (Record, pp. 141, 142.)

Q. State whether you talked over this matter of the pending suit of Graham and Scott against the La Crosse road with Mr. Sage at that time.

A. I reported to Mr. Sage the result of my interview with Mr. Graham.

Q. State briefly what that report was.

A. My report back to him was that I made the proposition, and he refused it. (Record, p. 142.)

Q. What I desire to know is, whether from anything Mr. Sage said to you, or you said to Sage, if he knew of the pendency of the suit?

A. Well, there is no doubt that Mr. Sage knew of the pendency of the suit.

Q. State whether the $60,000 that you were commissioned to offer Mr. Graham was to be merely for his judgment of law, or in settlement of the equity suit then pending.

A. It was understood that the purchase of the judgment would be an ending of the suit, and that was the object of the purchase. I speak of the suit that was then pending. I do not know anything about this suit." (Record, p. 143.)

On cross-examination, witness says:

"Q. Did you ever advise or inform the St. Paul Company that there was any suit pending affecting the title of the land in question?

A. I have no recollection of giving the information direct myself, but the St. Paul Company did know of the existence of the Graham judgment, and did know of this litigation." (Record, p. 145.)

Some days afterward, the witness Finch being recalled after an opportunity to refresh his memory, voluntarily adds,

that the "litigation" referred to in his previous testimony had reference to this suit.

Record, p. 150.

The records of the St. Paul Company show the period of Finch's directorship and the presidency of the company during the time material to inquire about.

The company was organized May 5, 1863, and David M. Hughes, Wm. H. White, Alexander Mitchell, Russell Sage, N. A. Cowdry, A. Finch, F. P. James, S. Chamberlain, and others, were elected directors, to hold until June, 1865.

On the same day Mr. Hughes was elected president and Mr. White vice-president, to hold for the same term.

June 25, 1863, White resigned his directorship and vice-presidency, and George W. Rogers was elected vice-president in his stead, and held the office until November 14, 1863, when he resigned, and Russell Sage was elected to fill the vacancy.

These officers remained unchanged until June, 1865.

Record, pp. 152, 153.

Finch says it was before 1864 that he carried Sage's proposition to Graham, but cannot state more definitely.

Record, p. 141.

Mr. Graham swears it was in the summer of 1863.

Record, p. 132.

In 1863 Sage offered Graham preferred stock of the company for his judgments and in settlement of this suit.

Record, pp. 132, 141 to 150.

Mitchell, in June, 1860, told Graham that it then looked more hopeful for getting something on his judgments.

Record, pp. 132, 133.

And several times after that, talked with Mitchell about his judgments. *Ibid.*

The indebtedness which formed the basis for the complainant's judgments, arose under a contract for grading a portion of the Milwaukee and Watertown road, and was entered into July 5, 1855.

Exhibit No. 5, Graham's testimony, pp. 203, 205.

The contract reserves fifteen per cent. of each month's estimate until the final estimate.

The work was commenced in July, 1855, and completed in the fall of 1857 or spring of 1858.

Record, p. 96.

The Milwaukee and Watertown road was consolidated with the La Crosse and Milwaukee Company by articles in writing dated September 25, 1856, the latter company assuming the indebtedness of the Watertown Company.

Record, pp. 232 to 234.

Powers, Tweedy, and Holton testified that the property bought by Nash was worth in its then condition from fifty to seventy-five thousand dollars.

Record, pp. 61, 71, 80.

Alexander Mitchell, now president of the St. Paul Company, shows that the lots were worth about one hundred thousand ($100,000) dollars.

Supp. Record, pp. 1, 2, 3.

The lots were 40 by 150, and 55 by 155.

Record, pp. 64, 70.

Dr. Judd, elected president of the La Crosse Company February 7, 1855, for a year thereafter, and called as a witness for the defendants, swears: (Supp. Record, p. 15.)

"I think the $15,000 in stock was not paid during my connection with the company."

This fact is explained by the receipt of Moses Kneeland, indorsed on Nash's contract of September 8, 1855, (Record, p. 196,) in these words:

"Received of C. D. Nash fifteen thousand dollars, in full of all claims on the within contract or obligation.

Dated July 21, 1856. La C. & M. R. R. Co.,
By Moses Kneeland,
Vice-Pres't."

Assignment of Errors.

(1.) The court below erred in dismissing the complainants' bill.

(2.) The court below erred in not rendering a decree according to the prayer of the bill of complaint.

Points and Authorities.

I.

The directors of a corporation are, in regard of the property of the corporation, trustees for the stockholders and creditors.

Jackson v. *Ludeling*, 21 Wall., 616, 624.
Field on Corporations, sec. 172.
Cumberland Coal Co. v. *Parish*, 42 Md., 598.
Railroad Co. v. *Poor*, 59 Maine, 277.
Commissioners v. *Reynolds*, 44 Ind., 509.
Bradley v. *Farwell*, 1 Holmes, 433.
Bliss v. *Malleson*, 45 N. Y., 22.

A director cannot be interested in a contract between the *corporation* and a *third* person.

Post v. *Russell*, 36 Ind., 60.
R. R. Co. v. *Bowler*, 9 Bush, 468.
R. R. Co. v. *Howard*, 7 Wall., 410, 411.

II.

The stock and property of a corporation are a fund for the benefit of creditors, and they may pursue its property, except into the hands of a *bona-fide* purchaser.

Curran v. *Arkansas*, 15 How., 307, 311.

III.

The sale from the debtor corporation to Nash, which creates the obstacle in the way of complainants' satisfying their judgment out of this property, was fraudulent and void.

In 1855, it is conceded, this property belonged to the debtor corporation; and unless it passed from the corporation by a conveyance effectual and valid as against the complainants, then it is still liable to be applied to satisfaction of the complainants' judgment. The transaction between the corporation and Nash in that year is relied upon to remove the property from the complainants' reach.

But this transaction was the barest-faced fraud ever performed.

The affairs of this company were managed by a board of directors and by an executive committee of the board, whose proceedings were subject to the approval of the board of directors. Kneeland, Kilbourn, Ludington, and Goodrich were members of the board of directors, and Kneeland, Kilbourn, and Goodrich were not only members of the executive committee, but constituted a majority of it. (Supp. Record, p. 10.) This sale was negotiated by the executive committee.

See *Goodrich's Testimony*, Record, p. 189.

Minutes of the Committee, Supp. Record, pp. 10, 11.

The action of the executive committee was ratified, in

part, October 17, 1855, at a meeting of the board of directors, at which Kneeland, Goodrich, and Ludington were present and acting; and the other part was ratified July 16, 1856, by the board, consisting of seven members, of whom Kneeland, Ludington, Kilbourn, and Goodrich were a majority.

Supp. Record, pp. 10, 11.

Kneeland, having induced Nash to make a proposition for purchase, voted in the executive committee to accept his proposition. He then furnished to Nash what Nash was to pay as the consideration for the purchase. Nash paid the $15,000 stock to Kneeland, which Kneeland had furnished him for that purpose, and Kneeland receipted for the same as vice-president. (Record, p. 196.) And Judd, the president of the company, swears that Kneeland never passed the stock over to the company while he (Judd) had any connection with the company. (Supp. Record, p. 15.) There is no evidence that it was ever paid to the company, except the receipt given by Moses Kneeland as vice-president.

September 24, 1855, Nash conveyed the whole property to Kneeland. (Record, p. 237.) October 31, 1855, Kneeland conveyed one-third to Ludington. (Record, p. 238.) Kneeland sold one-third interest to Kilbourn in the fall of 1855. (Record, p. 14.)

It does not appear from the record at what time Kilbourn sold to Goodrich, but it was probably in 1855. Afterwards, July 16, 1856, Kneeland, Kilbourn, Ludington, and Goodrich constituted a majority of the board of directors at the meeting which ratified and approved the sale to Nash. In other words, they ratified and approved their own right and title to this property, sold by themselves to themselves. (Supp. Record, p. 11.)

This transaction presents every feature and element, in greatly aggravated form, of the transaction which this court,

in *Michaud* v. *Girod*, 4 How., 557, *declared to be not voidable merely, but absolutely void.*

It is also a case within the exception to the general rule that a sale procured by fraud is voidable merely, as stated by this court in *Twin-Lick Co.* v. *Marbury*, 1 *Otto*, 589, and is to be regarded as void *ab initio*. The court, p. 589, after saying that the general rule is that purchases by a trustee are generally voidable merely, say:

"We say this is the general rule; for there may be cases where such contracts would be void *ab initio;* as, where an agent *to sell* buys of himself, *and by his power of attorney conveys to himself that which he was authorized to sell.*"

It can make no difference whether he sells under a particular power of attorney, or under a power conferred upon him in all cases, or by law in virtue of his office. The principle is, that a man cannot be both seller for another and buyer for himself; and when he does unite these inconsistent and conflicting characters, the sale is absolutely void.

IV.

The only question in this case that deserves serious consideration is, whether the complainants, who are *subsequent creditors*, can maintain this suit. This is the great objection made by our opponents to our recovery.

The indebtedness to complainants arose as follows:

They had a contract with the Watertown Railroad Company for grading, dated July, 1855, which reserved 15 per cent. from all estimates until the final estimate; estimates to be made monthly. Work commenced in July, 1855, and was completed in the fall of 1857. The liability of the judgment debtor arose from its consolidation with the Watertown Company, in September, 1856. So that the complainants were creditors, at least to the extent of the 15 per cent. reserved, of *the debtor company, from that date.*

The sale te Nash was made September, 1855, fifteen months before the complainants were creditors of the debtor company. To this we say:

(1.) If the sale is *void*, and *not merely voidable*, as to Nash and purchasers from him with notice, then the subsequent creditors may treat the conveyance to Nash as *never having been made*, and, of course, may levy on the property.

(2.) But even if this sale to Nash is to be treated as merely voidable, yet we maintain that a subsequent judgment creditor may reach the property.

First, let us consider this principle as applied to the dealings of an individual debtor; and secondly, inquire whether the right of subsequent creditors is not clearer in regard to the property of a corporation; that is, whether the assets of a corporation are not a trust fund for subsequent as well as existing creditors and stockholders.

First. It is a general principle that a creditor may, in equity, reach every *property right* of his debtor.

Williams v. *Thorn*, 70 N. Y., 270.

Even damages recovered for tort to property subject to execution may be reached by creditor's bill.

Hudson v. *Plets*, 11 Paige, 183.

Where a creditor sells the real estate of his debtor and becomes the purchaser, he may maintain bill to set aside a prior usurious mortgage.

Dix v. *Van Wyck*, 2 Hill (N. Y.), 525.

Creditors becoming purchasers of debtor's lands are not strangers, and may maintain any suit in regard to the lands that the debtor could have maintained.

Shaw v. *Dwight*, 27 N. Y., 245.

McMahon v. *Allen*, 35 N. Y., 405.

A judgment creditor may maintain suit to remove cloud upon the title to lands upon which his judgment would otherwise be a lien, even without issuing execution.

Shaw v. *Dwight*, 27 N. Y., 245.

But here execution has been issued and levied, and this suit is brought to remove cloud and obstruction to the sale, which it is conceded by the other side the debtor might have done.

Where A. is induced by fraud to convey land to B. under circumstances which, in equity, entitle A. to set aside the sale, the possession of B. under the voidable deed is not such adverse possession as to defeat a subsequent deed from A. to C.; and such subsequent grantee may maintain bill to set aside the prior voidable conveyance.

Livingston v. *Iron Co.*, 9 Wend., 511.
Dickerson v. *Burrill*, 1 L. R. (Eq. Series), 337.
McMahon v. *Allen*, 35 N. Y., 405.
Baker v. *Whiting*, 3 Sumner, 475.

The other side will cite

Prosser v. *Edmunds*, 1 Y. and C., Ex. Eq., 481;
Crocker v. *Belanger*, 6 Wis., 645;
R. R. Co. v. *R. R. Co.*, 20 Wis., 174;

and perhaps other cases, as holding a contra doctrine. They all rest upon *Prosser* v. *Edmunds, and are bad law.*

Prosser v. *Edmunds* is substantially overruled by *Dickinson* v. *Burrill*, 1 L. R., Equity Series, 337, and in *McMahon* v. *Allen*, 35 N. Y., 405, these cases are both considered, and by the *unanimous* decision of the court, *Dickinson* v. *Burrill* is followed. *McMahon* v. *Allen*, 35 N. Y., 405, is a case very like this case. The prior conveyance was obtained by fraud, and in violation of the duty imposed by fiduciary relations, and the grantor then made a general

assignment for the benefit of creditors; and the assignee brought bill to set aside the former conveyance, and the bill was sustained.

Again, *Prosser* v. *Edmunds*, and the cases following it, even if held to be good law, do not apply to this case, brought by a *creditor*. They all proceed upon the ground that the second conveyance is void upon the ground of champerty. This cannot be said of a proceeding by a creditor seeking to enforce the lien of his judgment on the lands.

The other side contend that the sale to Nash is to be considered upon the principles applicable to a sale by a debtor to defraud his creditors, where only existing creditors, or creditors intended to be defrauded, can set aside the sale. But that is not this case. Here a creditor having a judgment lien and execution levied upon certain lands of his debtor, asks the court to remove the impediment of a cloud, *which it is conceded the debtor might have done.* That is, he is seeking to set aside a sale made, *not* by the *fraud of his debtor*, but obtained by *a fraud upon his debtor;* and the question is, whether the right of his debtor to set aside such sale was a *property right* while it existed. If so, we claim we can reach it in equity, as we could reach any other property right possessed by the company at the time our suit was commenced, without regard to when we became creditors. We believe no case can be found where the doctrine of Prosser *v.* Edmunds has been applied as against creditors, whether prior or subsequent.

The philosophy of the doctrine that a subsequent creditor cannot set aside a conveyance made to defraud creditors, is, that by the fraudulent conveyance the debtor has parted with all his interest in the property. He cannot rescind the sale. *Existing creditors only are protected by the statute*, and subsequent creditors find *no property right* in their debtor which even the debtor himself could assert as against the fraudulent grantee. But where the former con-

veyance was obtained by fraud practiced *upon* the debtor, he has a property right remaining to rescind the sale.

The cases cited by us above—

Livingston *v.* Iron Co., 9 Wend., 511;

Dickinson *v.* Burrill, 1 L. R. (Eq. Series), 337;

McMahon *v.* Allen, 35 N. Y., 405—

hold that the debtor company, when our bill was filed, could have sold the property for value to the complainants, who could have set aside the conveyance to Nash. If so, they could have conveyed the property to complainants in satisfaction of their judgment, and the complainants could have set aside the conveyance to Nash. If so, we could levy on the property, and having thus acquired a specific lien, maintain such suit; *and that is this case.*

That the debtor company could have sold their interest in this property while they had the right of recission, see *Baker* v. *Whiting*, 3 Sumner, 475, where it is held that a trust estate may be sold, *even* where the trust is in dispute; and that, too, whether it be a trust created by deed *or arising by operation of law.* Nash, after the conveyance to him for the benefit of these directors, and the directors themselves after they obtained the title from Nash, *were in law mere trustees of the property for the benefit of the debtor corporation.* And the debtor company could have sold its entire interest in the property, and the grantee could have maintained bill to set aside the conveyance to Nash and by him to the directors, who were also *trustees by operation of law.* And if the debtor company could have sold its interest—its trust estate—in the property, surely any creditor could, in equity, reach such interest, or trust estate.

Secondly. We have thus far considered this question as though all parties to the transaction had been natural persons. But we contend that this case is governed by entirely

different principles, for the reason that the debtor was a corporation. We contend that the directors of a corporation, from the very nature of the case, *are trustees for subsequent* as well as existing *stockholders* and *creditors*. The stock of a corporation is constantly changing hands in the stock markets of the world. Every man who buys a share of stock becomes thereby a stockholder in the company. So every one who buys a bond of the company becomes a creditor from the date of his purchase only. It would work the greatest injustice and clothe the directors, the trustees of the property of the compainy, with the power to perpetrate the grossest frauds upon the public, to hold the distinction between prior and subsequent creditors as strictly as it is held in case of individual debtors. The property of a natural person is not a trust fund for his creditors. That of a corporation is. A natural person is not a trustee for his creditors as to his own property. The directors of a corporation are.

In *Bradwell* v. *Weeks*, 1 J. Ch., 205, and in *Cumberland* v. *Codrington*, 3 J. Ch., 229, approved by this court in *Bank* v. *Guttschlick*, 14 Pet., 19, 31, it was held that a beneficiary could claim the benefit of a trust created for his benefit, though he did not know of its creation at the time. See also *R. R. Co.* v. *Howard*, 7 Wall., 392, 409–411, where it is held that the property of a corporation is a trust fund for creditors; and we think this court meant *all* creditors becoming such during the life of the corporation.

See also *Jackson* v. *Ludeling*, 21 Wall., 616.

IV.

Ratification by Debtor Company.

The defendants rely upon two transactions to show ratification by the debtor company:

(1.) In 1858, March 10, resolution of the board—the

meeting consisting, among others, of Kneeland, Kilbourn, and Goodrich—(Supp. Record, 4, 5) reciting the sale to Nash, and his subsequent conveyance to Kneeland, and confirming the title of *Kneeland*, as far as the company had any interest.

Supp. Record, 4, 5, 6.

One-third of this property was then in Goodrich or Kilbourn, and both voted. Kneeland was present but did not vote.

(2.) May 24, 1859, resolution substantially like the above passed as to Ludington's and Kneeland's interest in the property—reciting that Kneeland and Ludington were members of the board when the sale was made to Nash, and directing deeds, of form prescribed, to be executed to Kneeland and Ludington. In pursuance of this resolution, deed of release was executed to Ludington only.

Record, pp. 224, 225, 226.

The deed from Kneeland to Ludington and the deed from Kneeland to Goodrich were both *quitclaim* deeds. The pretended ratification of 1858, which was voted by *Kneeland*, *Kilbourn*, and *Goodrich*, only pretended to ratify the title of Kneeland, and this ratification could not inure to the benefit of Goodrich or Ludington, who held only *quitclaim* deeds. The release of 1859 was only by deed to Ludington.

Record, p. 224.

The third belonging to Kilbourn, sold by him to Goodrich, and by him to Mariner, never was confirmed by the company.

To this we say—

(1.) This pretended ratification was made *without any consideration whatever.*

(2.) The complainants were creditors at the time.

(3.) The ratification of 1858 was made with three of the interested parties present, and two of them voting.

V.

The case shows notice to all the parties claiming under Nash, both actual, and constructive by virtue of the *lis pendens* of this suit.

VI.

One-third of the whole property which remained in Kneeland, after his conveyance of a third to Ludington and a third to Goodrich, remains in his heirs.

The deed by Moses Burr Kneeland pretends to convey his fourth part of Kneeland's third; but no proof is shown that the guardian was authorized to make the conveyance. A recital of such authority in the deed is no evidence of authority.

VII.

The pretended title obtained under the foreclosure of the Holton mortgage was another attempt to cover up and take advantage of the original fraud. The parties who were bound to pay the mortgage requested a foreclosure, and agreed that in such case they would buy the property, and did buy it, for the amount of the mortgage and costs.

The foreclosure was for their benefit, made at their request, and adds nothing to the validity of their title.

The Lee mortgage, in the same condition as the Holton mortgage, these parties—Kneeland, Ludington, and Mariner—paid at maturity.

(2.) Graham and Scott—these complainants—were

named as defendants in these foreclosure proceedings. Palmer and Stark pretended to appear for them, *but this was without authority*, and no *subpœna* was ever served on them.

Record, p. 134.
Record, p. 316.

Palmer swears (Record, p. 313) *that he has no recollection of being authorized by Graham or Scott to appear for them* in this foreclosure suit.

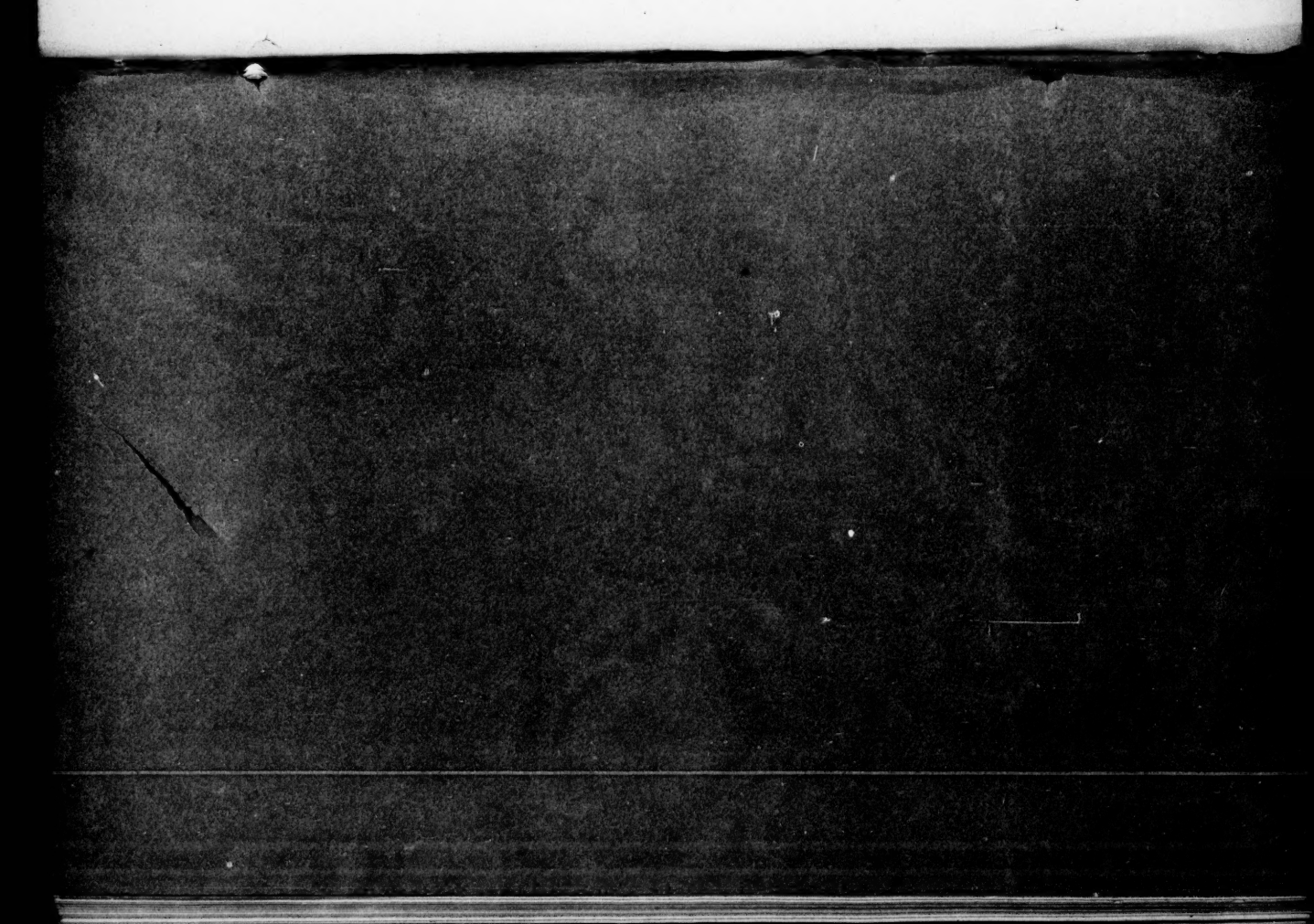
Record, p. 313.

VIII.

The heirs of Moses Kneeland were brought before the court by supplemental bill July 2, 1872. A plea of the statute of limitation was interposed and sustained so far as it related to a personal accounting of rents and profits; but no further.

Record, p. 46.

MATT H. CARPENTER,
N. S. MURPHEY,
Of Counsel.



OFFICE SUPREME COURT U. S.
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NO. 284.

Supreme Court of the United States.

LAWRENCE G. GRAHAM, Et. Al.

vs.

THE LA CROSSE AND MILWAUKEE RAILROAD COMPANY, Et. Al.

Brief of Respondents Ludington, Kneeland's Heirs and Mariner

E. MARINER,
Solicitor.

J. H. YEWDALE & SONS, PRINTERS MILWAUKEE.

Supreme Court of the United States.

No. 284.

LAWRENCE G. GRAHAM, ET. AL.

Appellants.

VS.

THE LA CROSSE AND MILWAUKEE RAILROAD COMPANY, ET. AL,

Respondents.

This is an appeal from a decree of the Circuit Court dismissing the Complainants bill.

The facts are substantially as follows: In September 1855, the La Crosse Company claimed title to some twenty-five lots at the confluence of the Milwaukee and Menominee rivers in the City of Milwaukee, part of the Menominee Marsh which it had acquired by consolidation with the Milwaukee and Fond du Lac Railroad Company, which latter Company had purchased the same for depot grounds. The depot of the first named Company was located in another part of the City, it had no use for the property

and was trying to sell it, (Mariner pages 120, 193.) The title to most valuable part of this property was questioned by Walker who had brought suit to reclaim the property which was then pending, (Nashs contract page 195 and proposition page 199.)

There was a large arrearage of taxes at the time and much of the property had been conveyed for taxes.

The property was mortgaged to Holton & Lee for about $5.000, (Nashs contract supra.)

The property was most of it under water and it would have cost thirty to thirty-five thousand dollars at the time to have docked and filled it so that it could have been used. It had no substantial market value. Twedy p. 64. Mariner p. 168.

On the 8th of September, Nash bought this property, at the request of Kneeland, who was one of the directors of the La Crosse Company, upon the agreement that Nash should take an interest in the purchase if he desired otherwise that Kneeland should take it, taking the company's title as it was, and agreeing to pay the mortgages and $25,000 for it, payable $10,000 in farm mortgages and $15,000 in stock of the company, then worth nearly par. Nash's Dep., p.

Nash and Kneeland concealed from the other directors of the company that Kneeland had any interest in the purchase and gave out that the purchase was for the benefit of Nash and Cook. Goodrich's dep. for plaintiff, (page 187,) and one-half of the payment was made with Cook's securities from bonds Nos. 577-88 and 89. Burnell's dep. p. 306.

Judd, Kilbourn, Kneeland, Goodrich, Ludington and Townsend were the executive committee of the Company which made the sale.

After Nash made the purchase, he declined to keep any interest, and conveyed the lots which were conveyed to him by the Company to Kneeland, and assigned the contract of the Com-

pany to convey the remaining lots to Kneeland, September 24, 1855, (Nash's dep. page 54, and assignment, page 196-202,) and Kneeland gave him an agreement to indemnify him, and gave him $15,200 stock and his note for $4,800 more as security for the performance of his agreement. (Agreement, Exh. 4 to Nash's dep., page 202.)

October 31, 1855, Kneeland procured Ludington and Kilbourn to take each a third of the purchase, and quitclaimed a third to each of them. (Kneeland's deed, page 238.)

Kneeland, Ludington and Kilbourn went into possession of the property and commenced improving. In April, 1857, Kilbourn sold to Goodrich his one-third of the property for something over $11,000. Goodrich made this purchase for the benefit of himself and Mariner, which sum he paid without notice that Nash bought for Kneeland's benefit in any way, or that any person made any adverse claim to the property, the first notice being from the filing of Cleveland's bill. (Kneeland's deed to Goodrich, p. 240: Goodrich's dep. for plff., p. 188—191.)

Mariner paid one-half the purchase money to Goodrich without any notice, but before he purchased Goodrich's interest, November 18, 1857, he had read Cleveland's bill. (Mariner's dep., p. 103-4 and 180.)

Cleveland filed his bill against the La Crosse Company, among other things to reach this property, October 31, 1857. (page 270—280.)

An interlocutory decree was made in this suit, in which the court held the purchase by Nash of the Company voidable, and after that the LaCrosse Company, when Kneeland, Ludington and Goodrich were no longer directors, passed a resolution confirming the sale to Nash, and quitclaimed the property to Kneeland and Ludington, (page 225.)

In 1855, the complainants made a contract with the Milwau-

kee and Watertown Railroad Company to grade a part of its road. September 24, 1856, the La Crosse Company purchased the Watertown Company's railroad, and undertook to pay all its debts. (Agreement, page 232.)

On the 21st of September, 1858, and on the 25th of November, the complainants recovered judgments in the State Court for work done on this contract, against the La Crosse Company. The 26th day of November, 1859, issued executions on those judgments and caused them to be levied on the lots in question.

On the 11th day of January, 1860, the complainants recovered judgment in the United States Circuit Court on these judgments of the State Court, issued execution thereon, and caused it to be levied upon the lots in question. And on the second day of June they exhibited this bill in aid of these executions.

On the 5th of November, 1863, the bill was dismissed as to Mariner.

On the 21st day of January, 1864, Moses Kneeland died intestate; September 24, 1864, the complainants filed their bill of revivor against Ludington, Kilbourn, Kneeland's administrator, and Chamberlain, which bill recites the dismissal of the bill as to Mariner. Subpoena was duly served upon all the defendants to that bill. p. 27-9.

November 24th, 1866, the bill was dismissed as to Kilbourn.

In January, 1865, the St. Paul Company purchased this property from Kneeland's heirs, Ludington and Mariner, for $18,000 each, which sums the Company paid without any knowledge of this suit. (Finch's dep., p. 141; Miller's dep., p. 108; Mitchell's dep., p. 300), which was a sound price for the property (Mitchell's dep., p. 301), since which that Company has expended over four hundred thousand dollars in permanent improvements. No other proceedings were had in this suit until September 14, 1863, when a supplemental bill was filed against the St. Paul Company. p. 31-40.

July 2, 1872, the complainant filed a supplemental bill against the heirs of Moses Kneeland, who plead the statute of limitations, and the plea was allowed upon argument.

On the 26th day of October, 1872, the complainants moved orally to make Mariner again a defendant to the bill, which motion was denied with leave to renew the motion upon final hearing. p. 46-48.

Upon the final hearing the complainants prayed to amend their bill by alleging, first, that the deed of confirmation to Kneeland and Ludington pleaded, was made without consideration and for the purpose of hindering, delaying and defrauding the creditors of the company, and therefore void.

Second.—That Nash agreed with the company to pay the Holton mortgage, and Kneeland agreed with Nash to pay it, and that therefore the defendants ought not to be allowed to set up title to the property under the foreclosure sale under that mortgage.

Third.—By alleging a sale and conveyance of this property by the railroad company (instead of by Kneeland and Ludington) to Nash.

The Circuit Court refused to permit the complainants to amend their bill, but vacated the order dismissing the bill as to the defendant Mariner and reinstated him as a party defendant.

And dismissed the original and supplemental bills with costs.

We think the complainant's suit must fail as to all the defendants, on either of the following grounds:

First. That the bill does not show that the complainants were creditors at the time of the sale; nor does it allege that the Company had any creditors at that time; nor does it allege any fraudulent intent on the part of the Company.

Seound. The bill avers title to the land in the company, June 15, 1856. It avers levies on the property by the Sheriff of Milwaukee County, Nov. 29, 1859, and by the Marshal, January 26, 1860, and that the property was at the time of such levies, situate in the District of Wisconsin and were lands and property of the LaCrosse and Milwaukee Railroad Company, subject to levy and execution or *fixre facias* in manner and form aforesaid.

The bill then alleges that Kneeland and Ludington were a Committee of the Company appointed to sell the lands and that they sold and transferred them, but omits to allege that the Company sold or transferred them.

Ihird. That neither the pleadings nor proofs show that the Company had any interest in this property which was subject to a levy at the time of these levies, the Company was possessed only of the right to pursue Nash and Kneeland for the fraud, and it had never elected whether it would pursue them at all, nor had it ever elected whether it would pursue them personally or pursue the property. That such right to elect to pursue is personal, and a creditor cannot seize it, nor can he exercise it.

Fourth. If a creditor can seize such right and exercise it, the levy of an execution upon the property does not seize this right of action for the fraud; until it has been exercised to the extent of electing to pursue, and to pursue the property instead of the persons, and such election has been followed by notice and tender of restoration of the parties to the condition where they started, it does not attach to the property so as to become an interest in property, but remains a bare right to pursue for fraud which, if attachable at all, (which we do not admit), is only attachable by a general creditor's bill, upon execution returned unsatisfied, or upon allegation that there is no remedy at law. And it makes no sort of difference whether the principle which counsel contend for, that all the property of a corporation is charged with a trust that its

debts be paid, is sound or not. If this right to prosecute for fraud is charged with such trust, that trust can only be enforced by a general creditor's bill, equally for the benefit of all creditors, and founded upon the failure to make the debt at law.

Fifth. The Railroad Company with full knowledge of all the facts confirmed, the sale before the complainants brought their suit at law, this confirmation was pleaded and there is no pleading of the complainants which attacks it.

Sixth. As to the property purchased at the foreclosure of the mortgage by the Bridgeport Savings Bank. Such purchase was made at a sale of the complainants interest in the property as well as the defendants. The defendants were under no obligation to pay that mortgage, unless they got the title which was the consideration of the obligation.

Seventh. By allowing this suit to stand without prosecution from 1860 to 1868, it ceased to be a suit "duly prosecuted," or a suit in full prosecution, and was not lispendens to an intermediate purchaser, for full value paid without notice.

The pendency of an action is not notice to purchasers under Chapter 124, Sec. 7, of the Revised Statutes of Wisconsin, for the year 1858, unless notice of pendency of the action was filed in the office of the Register of Deeds. If therefore the St. Paul Company is not charged with actual notice there can be no recovery against it.

Eighth. As to Ludington, Kneeland's heirs and Mariner there are no charges in the bill which will justify rendering a personal decree against them. This suit is simply a bill to remove a cloud upon title in aid of execution; there is no charge in the bill of the sale of the property or receipt of the money. If relied upon as a statutory creditors bill it should aver the return of execution unsatisfied, or as a creditors bill, under the

general power of the Court of chancery it should show that the complainants had exhausted there remedy at law by issue and return of execution.

Ninth. That as to the interests of Ludington, he was not privy to the original purchase, and no notice is proved upon him that Nash bought for Kneeland. Before Ludington bought from Kneeland, Nash had conveyed to Kneeland, and the company had been made aware of the fact and had accepted Kneeland's undertakings to pay the mortgages, and indemnify them from suits for Nash's, and had surrendered Nash's.

Tenth. As to the Kneeland heirs. The statute of limitation is a bar.

Eleventh. As to the interests of Mariner—first, that stipulation to dismiss this bill as to him is not a judicial proceeding but is a contract between the parties to the stipulation, and while that contract is in force the court has no power to vacate the order of dismissal. That contract can only be annulled upon pleadings. By dismissal of the bill upon stipulation the court lost jurisdiction of a party and can only acquire jurisdiction of such party by original bill and subpœna. Goodrich and Mariner purchased and paid for the property the full value without notice that Nash bought for Kneeland.

I.

Before a transaction can be held void as made with intent to defraud creditors, the complainant must establish that there are creditors to be defrauded, present, or in immediate contemplation. There is no allegation in the bill that the railroad company owed a debt till 1858, full three years after the property was conveyed.

Another essential is that the debtor shall intend by the transaction to defraud its creditors present or in contemplation, or that the act shall be such that the direct result of it will be to defraud creditors, *then being creditors*, from which the law will infer the intention to defraud. To make a transaction fraudulent and void as to future creditors, *there must be fraudulent intention* on the part of the debtor. Subsequent creditors cannot impeach prior voluntary gifts, when made without dishonest intent as to creditors. Mattingly vs. Nye, 8, Wall, 370.

And this intention must be the intention of the debtor. A stranger alone cannot defraud the debtor's creditors. He may defraud the debtor, and the result may be that the debtor's creditors will suffer, but the fraud will be a fraud upon the debtor only, unless the debtor participates. If the debtor is an individual existence, his property until his creditors have acquired some lien upon it is his own. The law invests him, and him alone with the power and right to protect it! It redresses him, and him alone, for injuries to it,. He, and he alone, may retake it when he has been deprived of it. So long as he deals with his property in good faith, the property is bound by his dealing as far as his creditors are concerned. It is of the very essence of the idea of property that the owner may do as he likes with it, acting in good faith. It was in the power of the company to sell the land at this time, at the price and terms it actually received, and no one could complain. It had no creditors. If it was imposed upon, it was the best judge of the extent and effect of the imposition. Why should not it, and it alone, exercise the right of recission, or the right in any wise to sue for redress of any wrong to the property.

A fraud, to be the basis of an action in favor of a party, must be directed against that party. If a defrauded debtor's creditors can maintain an action against the party defrauding, why cannot the members of his family who suffer as well? Where does the right of action cease if not with the party directly defrauded.

If the company was a separate entity capable of acting and being acted upon, when it was acted upon by Kneeland, the legal effect of the acting stopped with it. If the company colluded with Kneeland to defraud its creditors, then the acting was not upon the company, but upon the creditor, and he could not redress it.

If there be neither creditor, nor contemplated creditor, nor even a fraudulent intent of the debtor,—*then the sale is not fraudulent as against creditors*, and a bill which omits to allege the existence of such facts, one or more, is insufficient to set aside a sale on the ground that it was made to defraud creditors.

It is also imperative that the bill in aid of execution which seeks to set aside a sale on the ground that it is fraudulent as to creditors, should show that the creditors have been or would be defrauded by the sale. Green vs. Tanner, 8 Met. 411—419. This is perhaps the same point over again; but it seems to us that there is a distinction. There may be creditors to defraud, and an intention to defraud them, or there may an intention to defraud future creditors, and yet creditors may not be actually defrauded; they may still be able to collect their debt at law; and we insist that a creditor has no right to file a bill in chancery to set aside as fraudulent a conveyance of the debtor's property *so long as he can make the money at law*, and that his bill must show by averment at least that he cannot make it at law.

Payne vs. Sheldon, 63 Barb., 170.
Shaw vs. Dwight, 27 N. Y., 244.

This matter is very thoroughly considered in N. A. Fire Ins. Co. vs. Graham, et. al. 5 Sand Sup. Ct. 197, and in Neate vs. Duke of Marlborough, 3 Myl & C. 407, and cases there cited, to which we beg to call the attention of the Court.

We do not mean to say that he must aver that he has gone through the form of exhausting the remedy at law, but he must

do either that, or aver facts which show that it will be idle to do it, in short that if the sale stands he will be defrauded.

There is nothing of the kind in the bill. It even appears that the company, defendant, owns a railroad from Milwaukee to La Crosse.

II.

It was conceded at the hearing below that the bill did not state a cause of action, in that it omitted to aver *that the company* had conveyed this property. The alleged sale and conveyance by Kneeland and Ludington, without a conveyance by the company, would not make a cloud upon the title, nor interfere with a sale under a levy, especially taken with the allegations that *the company was seized in fee in* 1856, *and that the property at the time of the levy was the property of the company liable to levy and execution.*

Carney vs. Emmons, 9 Wis., 114.
Moore vs. Cord, 14 Wis., 213.

If the property was the property of the company, it alone could transfer it. It must be transferred by deed, and only the company's deed could transfer. If the company did not convey, and upon the allegations of the bill, it did not, then the property in the language of the bill: "was the property of the company subject to levy of execution in manner and form aforesaid;" and there was no need of filing this bill. The sheriff of Milwaukee county could have made the money on his execution, and the jurisdiction of this Court need not have been invoked to aid the writ of that Court.

III.

As we understand the theory of the Complainants, they attempt to show that an interest remained in the Railway company, upon which they might levy, notwithstanding the company had conveyed

the property long before, for the reason, that such conveyance was induced by fraud practiced upon the company by Kneeland and Nash, either actual or constructive.

THE CHARGE OF FRAUD in the bill, "that while said Company defendant was so seized of said land, the said Moses Kneeland and James Ludington were appointed by the Board of Directors of said Company defendant, or by the executive committee of said board, (which said board was composed of the said Kilbourn, said Kneeland, said Ludington, and others), a committee to sell and dispose of said lands, worth at that time to the said Company, (as the said Kilbourn, Kneeland and Ludington then well knew,) more than one hundred thousand dollars, and your orators are informed and believe and therefore say, that the said Kilbourn and the said Ludington, then and there designing and intending to injure and *defraud said company and its creditors*, and disregarding their duties as directors aforesaid, in the premises, and intending unlawfully and fraudulently to acquire to themselves, and the said Kilbourn, or some other person or persons, by a violation of their duties as directors as aforesaid, did sell and transfer the said lands, worth, as they then and there well knew, more than one hundred thousand dollars, to one Charles D. Nash, for the nominal consideration of twenty thousand dollars, in bonds or stocks of said company defendant; but that said Kilbourn, said Kneeland and saidLudington, or one of them, furnished to said Nash, directly or indirectly, whatever the said Nash pretended to pay to said Company for said lands, and that said sale was made to said Nash with the fraudulent, secret arrangement and understanding, between said Nash and said Kilbourn, said Kneeland and said Ludington, or one of them, that said Nash should thereafter when requested by said Kilbourn, Kneeland or Ludington, convey and transfer said lands to said Kneeland, said Kilbourn or said Ludington, for the benefit of said Kilbourn, Kneeland and Ludington, for a nominal or no consid-

eration," (which are all the facts mentioned to show that the sale was made intending to defraud the creditors), is insufficient to avoid the conveyance AS A FRAUD UPON THE CREDITORS, *although it may be a charge of fraud upon the debtor.*

"In suits instituted for the purpose of impeaching transactions on the ground of fraud, it is essential that the nature of the case should be distinctly and accurately stated. A mere general charge of fraud without alleging specific facts is not sufficient. It must be shown in what the fraud consists, and how it has been effected. The fraud alleged must be set forth particularly and in detail, so that the person against whom it is charged may have the opportunity of knowing what he has to meet, and of shaping his defense accordingly."

Kerr on Frauds, 365.

The only allegations of fraud in the bill, are allegations of fraud practiced by the defendants Kneeland, Ludington and Kilbourn *upon the debtor!* The bill makes no charge against the debtor. *The complainants do not distinguish between a fraud practiced by the purchaser upon the debtor, and one practiced by both debtor and purchaser upon creditors,* but seek the same relief that they would have been entitled to, had they actually been creditors at the time, and the company had made the sale to these parties at a grossly inadequate price, both the company and the purchaser intending thereby to cheat the company's creditors. No authority is shown for such doctrine. It has found no place in any treatise on equitable jurisdiction. No case can be found which extends the provisions of the statute of Elizabeth so far as to avoid a sale by a debtor where it was made in perfect good faith on his part.

We agree that had the complainants been creditors at the time, and the company being insolvent had intended to sell this property to defraud its creditors that the Court ought as between the parties to the sale and the complainants to set aside the sale,

and that such a gross inadequacy of price *as is set out in the bill*, would in case of an insolvent company have been sufficient evidence of an intention to defraud creditors; but in such case *while the sale would have been voidable by creditors, it would not have been voidable by the debtor.* If there were no creditors, or the creditors had contrived to get their pay in any other way, the sale must have stood.

The only allegation of actual fraud in the bill as distinguished from constructive fraud, is the allegation of inadequacy of price.

The only question as to that is, is it so gross as to be in itself evidence of fraud?

Kerr, 189, and cases.

Astor vs. Wells, 4 Wheaton, 466.

The pleadings and proofs in the case leave the company fully informed as to the value of the property, and desirous to sell.

The witnesses all concur in this. A short time before this sale this property was comparatively valueless, it suddenly became very valu-able in the market and as suddenly depreciated to its former value.

We regard the testimony of Dr. Judd, who was president of the company at the time, and who was then trying to sell this property, as the most reliable testimony as to the value of the property, *because he tried to sell this very property in this city at this very time.* There is a wide difference in point of accuracy as to the precise date of a particular stage of the fever of speculation in favor of the testimony of a man who tried the market at the very time with the very property, as against the remembrance of one recalling values ten or fifteen years after the fever has past. All the witnesses concur in stating that the property could not be made useful without a very large expenditure, and that its value was *entirely speculative.* Dr. Judd testifies that he offered the property repeatedly to the real estate agents here that summer, and

that $25,000 was the asking price. The final sale of this property ten years afterward, for all it was worth, after twenty thousand dollars has been spent in permanent, necessary improvements, and after the population of the city had nearly trebled, for little more than the money *so spent for improvements* kept at interest at ten per cent. and less than the price paid so put at interest at the time of the sale, would amount to, is valuable testimony to show that it had actually very little value. The proof shows that the stock, and bonds paid were worth nearly par at the time. (Nash's dep. p. 56.) If the price were inadequate, grossly so, and the defendants intended to acquire the property at such a price, it would be a fraud *upon the debtor and not upon the creditor*, under the pleadings and the proof.

The only allegation of fraud in the bill worth any attention is the allegation that Kneeland and Ludington were appointed a committee to sell this property, and that Kilbourn and Kneeland being directors, sold and transferred it to Nash, who was acting for them, at a grossly inadequate price.

A bill by the company to set aside this conveyance might go upon one of two grounds:

First.—That its conveyance was obtained by one of its directors at a grossly inadequate price, through its own ignorance of the value and the fraudulent misrepresentation of its value by this director purchaser, which conveyance it would not but for such circumstances have executed.

Or:—

That by reason that its officers to whom it had intrusted the duty of obtaining the best price, had become the purchasers.

The first case would go upon the ground that the Company was on one side contracting with the purchaser on the the other and invalidates the transaction because it had been wronged out of its estate by the false practices of the purchaser. It could be

defeated by proof that the company had full and complete knowledge in those matters as to which it alleged misrepresentation and concealment. The material difference between this case and a case against a stranger, would be, that against a stranger the burthen of establishing the fraud would be upon the Company; against a director, the director must show the transaction fair, but the bill must in each case allege the matters from which the law infers the fraud.

The second case would go upon the ground that at the apparent sale really only the purchaser had been represented; that the vendor had never consented. It would be no defense that the price was ample and the sale advantageous to the Company. The Company had the right to determine whether it would sell and upon what terms! In short, to be represented at the sale! And not having been so represented, the Court will upon its election and request within a reasonable time after knowledge of the facts, rescind the sale unless the rights of the third parties have intervened.

The bill in this case proceeds upon the last ground. By failing to allege the contrary it admits, and the testimony of Dr. Judd shows that the Company had full and complete knowledge as to the value and condition of the property! The bill sets forth no false representations of, nor any concealment touching the property! But it does allege that the Company was not represented at the sale: that only the purchasers were represented! It also alleges that the Company was damnified by the sale. And it admits three years acquiescence by the Company with complete opportunity of knowledge.

Conceding for the argument that this makes the sale voidable at the election of the Company, is there any interest in the land left in the company, upon which an execution against it can be levied until the company shall have elected to rescind and shall actually have rescinded the sale,—*can a creditor elect for the Company*

to rescind the sale? Can he maintain an action thereupon to avoid the deed? Is not the right personal to the party upon whom the fraud was practiced?

The property in goods, which the former owner has been induced to transfer by fraud, does not revest by the bare election to rescind the sale. The party must elect, give notice of his election and restore, or offer to restore, what he got for it, before he is in a condition to bring a suit for it. Norton vs. Young, 3rd Greenleaf, 30.

The title to lands can only pass by deed. When the defrauded grantee has elected to rescind and given notice of his election, has restored, or offered to restore, what he received, and has demanded a re-conveyance he then is only in a condition to bring a law suit to get his title back! He has only a hostile right against the possessor to bring a suit in equity for the title, not an interest in the land but a right to litigate for the title.

Jewitt vs. Hill, 80 E. C. L., 287.
Austin vs. Taite, 8 W. C. L. 35.
Dewey vs. Hoag, 15 Barb., 365.

In considering this question it must be borne in mind that there is neither allegation nor proof of any intent *on the part of the Company to defraud creditors* in the original transaction. The fraud intended, if any, was a fraud upon the Company, which was not then a debtor.

Upon what principle can a creditor make this election, and thereupon maintain an action to avoid the sale? How can he exercise the right of election?

It is a uniform rule from which there is no variation that in order to enable a party who has been defrauded, to rescind a sale of either real or personal property, that the party rescinding must

put the other party in the same plight he was before the purchase, and he must do this when he elects.

Kerr, 48–9, and cases; 334, and cases.
2 Parsons on Contracts, 678, Note a.
Story's Equity, §§ 596, 707.

There is no election until notice of such election is given.

Busse vs. Gallegger, 7 Wis., 442; Bank vs. Bank, 9 Wis. 57, 14 Wis. 313, 15 Wis. 571.

And the bill must offer to return what was received.

1 Daniel Ch., p. 497–8, marginal paging.

If he has put it out of his power to return what he received, he cannot rescind. Vease vs. Williams, 8 Howard 158.

Notice of an election to rescind will not put a party in a situation to bring a suit to recover chattels even, he must offer back what he received for them, even telling the party to come and get them won't do.

2 Parsons on Contracts, 679.
Morton vs. Young, 3 Greenl. 30.

How can a creditor put the purchaser where he started?

If the consideration was money, he might pay back a like sum but if, as in this case, it was something else which he has not and cannot get, how can he replace the parties where they were?

If the creditor could return the very things, to whom should the defendants convey? Obviously not to the creditor, that would be a sale and not a rescission.

It there could be a rescission at the election of a creditor upon his bill, there can be none in this case for the reason that the complainants do *not offer or pray rescission.* They undertake to grasp the estate without offering rescission; and they propose that

the Court shall adjudge that their judgment is a lien on the estate, in the hands of the defendants, and that they have leave to sell it, to make the amount of their debt without paying back what the defendants paid the company, or what they have spent in improvements. See Kerr, 349, 350. Their bill goes upon the ground that the transaction is absolutely void as to them and no other. They can therefore have relief only on that ground. Kerr 383 and note.

All the text writers treat this right to rescind for fraud as a right personal to the debtor, which cannot be assigned even to a creditor so as to enable him to exercise it.

2 Chitty on Contracts, 1364.
1 Parsons on Contracts, 226.
Story's Equity, §1040 g.
Kerr on Frauds, 40.

It is also settled that this right of recovery for tort is not assets which receiver or assignee in bankruptcy can take.

The following cases decide that the interest of a defrauded vendor of lands is not assignable so as to allow the grantee to rescind the sale, and recover back the property.

Prosser vs. Edmonds, 1 Young, and C. Exchequer in Eq., 481.
Bellangee vs. Crocker, 6 Wis. 619.
The Railroad Co. vs. The Railway Co., 20 Wis. 174.
Rogers vs. Spence, 11 M. & W. 191. Burt vs. Buckingham Co. 16 Iowa, 284.

In Comstock vs. Ames, 42 N. Y., 357, the Court Judge Hunt presiding, held that a right to rescind for a tort was personal.

If neither assignee nor receiver can take it, if it is not assignable by the party, how can a creditor who claims through,—for he cannot claim against an honest party,—lay hold of it?

The complainants contend that the above authorities have

been questioned and practically overruled by the cases of Dickenson vs. Burrall, 1 Law Reports Equity cases, 337, fully cited in McMahon vs. Allen, 35 N. Y., 405, with one exeception, which is, that in the deed of settlement to the trustees' complainants, it was recited "that James Dickinson disputed the validity of the conveyance sought to be avoided." But these cases are different from Prosser vs. Edmonds, Bellangee vs. Crocker and The Railway Co. vs. The Railroad Co. in 21 Wis., upon the point suggested by the Circuit Judge at the hearing; to-wit: That in the cases cited by the defendants, *the parties wronged elected to abide by the transaction notwithstanding the wrong.* While in those cited by the complainants they *elected to rescind* before the assignment.

So long as they had not elected to rescind, they had certainly *no property interest*; and if they assigned anything, it was the bare right to have a law suit. In the language of Lord Abinger, in Prosser vs. Edmonds, supra, "a mere right to recover," is not assignable.

These cases expressly proceed upon this ground. The master of the rolls in the first case says: "I think the distinction between the conveyance of the property itself and the conveyance of mere right to sue, or what in substance is a right to sue, is taken in Prosser vs. Edmonds * * * * and it is, I think, founded in reason and good sense."

It is also to be observed that in this case the action was brought by trustees for the benefit of the party defrauded for life, and for his heirs. Each and all the cestuis-que trust could maintain the action, which the trustees had brought for their benefit, if there had been no deed of settlement. The case of McMahon vs. Allen proceeds upon the authority of Dickinson vs. Burrell, and the cases in 14th and 21st New York, therein cited. Although it is not expressly so stated, an examination of the printed case shows that Harrison had elected to avoid the sale before he assigned to the plaintiff and directed his assignee to sue and recover

and that this fact was proved upon the trial, and the case goes upon the doctrine that there was a property interest in Harrison when he made the assignment, and that the right to maintain the action passed as an incident to the property interest by the conveyance of that interest.

Now, we do not wish the Court to suppose that we agree with these cases; on the contrary, we think them against the clear weight of authority, we think that in a doubtful case the Wisconsin decisions should prevail, if for no other reason than to secure uniformity of decision within the State, in matters touching real property. Whatever estate Dickinson in the first case, and Harrison in the second case had in the premises, actually passed by their respective deeds, they had no longer any property right, "no right that anybody except themselves had ever recognized." And while we ordinarily say that a man may rescind a contract upon discovery of fraud, we mean that he may rescind it in a manner known to the law. As to personal property the rescission may be by election and notice and return or tender of the consideration of the sale, and demand of the property, whereupon the defrauded party may maintain a suit to recover the property, if the wronged elects to rescind a conveyance of land and returns the consideration for the sale, or offers to return it and demand a reconveyance, the contract is not thereby rescinded, he cannot yet maintain an action to recover the possession of the property. It still requires the intervention of a Court of Equity or the deed of the parties to rescind the contract. After the election of Dickinson to rescind, he could not have maintained an action of ejectment to recover the lands, nor could he have defended himself in possession. The title still remained in his grantees, and the conveyance could only be rescinded by the decree of a Court of Equity, or a release by the grantee. So in the case of McMahon the property was just as thoroughly in Allen, after he elected to rescind and before he conveyed, as it was on the instant of execution and the delivery of the conveyance to

Allen, and the subsequent conveyance to McMahon, actually passed nothing, for he had nothing to convey. He had nothing except a bare right to maintain a suit to rescind the sale and obtain reconveyance of the lands.

The principle decided in 14 and 21 New York,—"that he who sells a security, and receives pay for it, necessarily sells whatever claim or right the security is understood by the parties to represent"—has no application to the case.

The statement which the master of the rolls supposes exhausts the case, is as follow: "The distinction is this, if James Dickinson had sold or conveyed the right to sue to set aside the indenture of December, 1860, without conveying the property, or his interest in the property, which is the subject of that indenture, that would not have enabled the grantee to have maintained this bill, but if the grantee had bought the whole of the interest of James Dickinson in the property, then it would." What do these propositions mean as applied to the facts? James Dickinson had conveyed this land absolutely; he had no estate whatever in it, nor any contract about it. In the language of Lord Abinger, "he had not such an interest in the property as was recognized by third parties," only "a bare right to overset a legal instrument;" "a hostile right to bring parties into a Court of Equity." He had no possession, or right of possession, nor right or instrument of title which would protect him in possession. If by the first proposition he means to describe a transaction which should authorize a party to maintain a suit, while the decree should enure to the benefit of the party so authorizing (and we can hardly distinguish that from the case made by the bill he was discussing, the trust was a dry one to the trustees complainants, beneficial only to Dickinson and his heirs; the decree for *purposes of enjoyment*, would benefit Dickinson and his heirs just as much in one case as it would in the other), is the instrument which secures such a right an assignment? How can the right be exercised? In whose name? At the common law we

bring suits for the assignee of a non negotiable chose in action in the name of the assignor, for the use of the assignee, but who ever heard of bringing a suit in the name of the assignee for the use of the assignor at law or in equity? This is as true of an action upon a contract capable of possession, a non negotiable promise to pay money loaned, as of an action for slander. A bare right to sue, without the right to enjoy the fruits of the litigation, if the phrase has any legal significance, is a mere appointment of an attorney, not a right of property at all. It is not the subject of a grant, it rests in appointment, and must be exercised if at all, in the name of the party in whom is the right to recover and enjoy the fruits.

It seems to me that the master of the rolls could not have contemplated a transaction, the result of which should still have required the action to have been brought in Dickinson's name. That he must by the first proposition have intended the transfer of the right of action so that the transferee could bring it in his own name in equity and enjoy the fruits.

What else had Dickinson to transfer than such a right?

If there is such a distinction as the Master of the Rolls suggests, in such a case as he was considering between a conveyance of a bare right to use and enjoy the recovery and a conveyance of the grantee's interest in the land which he shall recover—where does the one leave off and the other begin? It is a rule of property he is considering! It should be certain! I would like to know after the grantee of the rignt to sue had brought the suit, recovered, and had the fruit of the recovery, what there was left of property in the grantor! I would like to know what property there is in the right to make an election to rescind. It does not even, until exercised, lay hold of the property, touching which is the right of election. The right of recission is only one of the rights a defrauded party has. The injured party may, if he

pleases, bring a personal action for deceit. Kerr, 330, and cases; Van Epps vs. Harrison, 5 Hill, 63. Oliver vs. Piatt, 3 Howard, 333—401; and the party guilty of the deceit cannot return the property in satisfaction of the action, but if he elects to sue for the deceit he cannot afterward rescind, the title to land cannot rest in volition. This case of Dickenson vs. Burrall seems to have been settled. I have examined the subsequent reports, but find no further trace of it. Unless it is taken to overrule Prosser vs. Edmonds, it cannot be regarded authority for anything except that a defrauded grantee, after he has elected to rescind, and put it out of his power to bring a personal action for deceit, and done everything which the law requires as condition precedent to rescission, has such an interest in the property as he can convey. Perhaps this is all those courts intended to hold and for that reason they have not in terms attempted to question the cases we have cited, which have found their way with approval into all the leading text books, and have been for years regarded as part of the body of the law.

If that is all they decide, they do not help the case of the complainants.

But if a creditor may elect to rescind, which creditor may elect?

The creditors of an insolvent corporation stand upon an equal footing. R. S. 1858, P. 875, Sec. 19. Adler vs. Brick Co., 13 Wis. 57. Morgan vs. The Albany R. R. Co. 10 Paige, 290. We borrowed our statute from New York, after that decision, which has been substantially repeated by the Supreme Court of the United States, in First Nat. Bank vs. Colby. 21 Wall 609.

The rule that a corporation which has made a conveyance to its agent, through the procurement of such agent must, when the fact is brought home to it elect in a reasonable time, whether it

will abide by the transaction or rescind it, is just as absolute as the rule that it may rescind if it chooses.

IV.

How can a creditor seize it by levy and sale upon execution so long as the title is valid? The jurisdiction under a bill in aid is merely to remove a cloud upon the title not to acquire a title. A sheriff's deed would not be evidence of title in favor of the grantor. It is absolutely essential in order to reach equitable interests of a debtor, that is, interests only cognizable in equity, that it appear by the bill that the remedy at law has been exhausted before the filing of the bill. Jones vs. Green, 1 Wall 330, McElwain vs. Willis, 9 Wendell 548 and cases cited, Dunbury vs. Talmage, 32 N. Y. 460. Vorhees vs. Howard, 4 Keyes 383.

V.

If the right of election as to whether a defrauded debtor will rescind is property, how can a creditor attach it? How can he acquire the right so as to be able to exercise it? Certainly not by attaching the land, for until the election is made, and everything to warrant a decree rescinding in a proper case, the right of action does not attach to the land; it remains personal; by reconveying the purchaser cannot defeat it. Oliver vs. Piatt, supra; the land is the property of the purchaser not liable to attachment in an action against the vendor!

The company not only has not objected to this sale, but while Kneeland was still a member of the board, March 10, 1858, after having been impleaded with these defendants by Newcomb Cleveland, in a suit similar to the present (Cleveland's bill p. 270,) voted to confirm the sale, Kneeland not voting, (resolution annexed to Kneeland's answer), and afterward and when Kneeland was no longer a director, voted again to confirm the sale before

the complainants brought their suit at law and this confirmation is in writing, was pleaded, and the execution is proved. So that the case is exactly like Prosser vs. Edmonds. This confirmation is not impeached by any pleading, as it was in Prosser vs. Edmonds, and proved, is a perfect defense to the action.

Why should not this confirmation stand? It was conceded on the hearing that a director who stood out like a man and openly proposed to buy of the company represented by his fellow directors, might buy although he was president and his vote made the quorum, and he signed the conveyance to himself. Buck vs. Buckingham, 16 Iowa supra. When a party has once elected he is concluded by his election.

VI.

As to the property purchased at the foreclosure sale on the mortgage by the Bridgeport Bank.

The interest of the Complainants as well as the defendants was sold at the sale. It is true that Graham swears that Palmer & Stark were not authorized to appear for them in that suit and Scott swears that they were not their attorneys at all. But Mr. Palmer who signed the *appearance* says, they were so authorized. He was then a leading leading lawyer in Milwaukee. His integrity and ability are beyond question. However the Court may find this contradiction, the fact remains that the defendants answered this sale of this property to have been made under decree in this case and that the complainants were parties. This imposed upon them notice of the fact! If they proposed to repudiate the appearance it was their duty to do it *then* and correct the record of that suit and sale by having the unauthorized appearance vacated, or at least amend their bill by denying that they were parties to that action.

The Complainants allege that the defendants cannot claim

under that title for the reason that Nash & Kneeland were bound to pay that mortgage. They were not bound to pay it except as part of the price of the property for which they were not obliged to pay for unless they have it.

VII.

As to the St. Paul Company there is no proof of actual notice of any claim on the part of the complainants or the Railroad Company to this property, nor that Nash bought for the use of Kneeland. It is true that the witnesses Finch & Mitchell confuse this suit with some litigation about the Eastern division of the La Crosse road, of which this property never constituted any part, but they both clear the matter up. Finches Dep. p . Mitchell's Dep. p .

It was claimed below that the St. Paul Company having purchased pending this suit, that they were charged thereby with notice.

The witness Miller who examined the abstracts, testifies that he could swear positively, that no mention was made of this suit in any of the abstracts, P. 108-9—and that he cannot say whether he knew of the pendency of this suit at the time, page 98.

A purchaser charged with constructive notice is only charged with what the records or deeds which charge him shows. He is not put upon inquiry like a man who has actual notice, the phrase legally implies actual ignorance, but prohibits the party from denying knowledge. A man who has knowledge sufficient to put him upon inquiry must follow it up, but a man who has no knowledge has nothing to follow.

In regard to the notice chargeable upon a party purchasing *pendente lite*. The rule at the common law was, that a lispendens *duly prosecuted* is notice to a purchaser, so as to bind him. Murray vs. Ballon, 1 John, ch. 566. The ordinance of Lord Bacon was

"no decree bindeth any that cometh in bonafide, by conveyance from the defendant before the bill exhibited, and so no party, neither by bill nor order, *but when he comes in pendente lite,* AND, WHILE THE SUIT IS IN FULL PROSECUTION, and without any color of allowance or privity of the Court then regularly the decree bindeth." In this case, at the time of the purchase by the St. Paul Company, the suit was not pending as to Mariner, nor as to Kneeland's heirs. Purchasing of them, the St. Paul Company was not a purchaser pendente lite. The suit was not pending as to Kneeland's and Mariner's interests in the property after Kneeland died, in Jan. 1864, till the St. Paul Company was made party to the suit in 1868. It was not during that time in the language of Lord Bacon, "in full prosecution" nor in the language of Chancellor Kent, "duly prosecuted."

Leitch vs. Wells, 48, N. G. 585.

This case recognizes the effect of the statute as to notice, which we suppose is controlling.

The Revised Statutes of this State. in force at the time of the bringing of this suit, is as follows Chap. 24, Sec. 7 of the Revised Statutes of 1858:

"In an action affecting the title to real property, the plaintiff at the time of filing the complaint, or at any time afterward, may file with the register of deeds of each county in which the property is situated, a notice of the pendency of the action, containing the names of the parties, the object of the action, and a description of the property in that county affected thereby, and if the action be for the foreclosure of a mortgage, such notice must be filed twenty days before judgment, and must contain the date of the mortgage, the parties thereto, and the time and place of recordiug the same; from the time of filing only shall the pendency of the action be constructive notice to a purchaser or incumbrancer of the property affected thereby."

This is a rule of property under the control of the State Legislatures exclusively, 4 McLean 230. Brine vs. The Insurance Company, 96 U. S. 627. Orvis vt. Rowell, 98, U. S. 176. It does not limit the jurisdiction of the United States Court, nor provide how its jurisdiction shall be exercised. It merely provides how the title to real property can be affected by the proceedings of Courts.

VIII.

The defendants Kneelands Heirs, Ludington and Mariner have sold their respective interest in this property since this suit was brought. Kneelands heirs were paid eight years before they were parties at all, and Mariner while this suit was dismissed as to him and more than seven years before the application was made to revive the suit as to him.

If the court shall be of opinion that the La Crosse Company had an interest in the lands which could be sized upon an execution, and that this bill in aid is a sufficient proceeding to reach such interest, it does not follow that it lays hold of the proceeds of these sales in the hands of the parties but rather that it follows the lands; especially it does not follow that this bill creates a lien or lays hold of this purchase money which was secured while the suit was not pending as to the parties who received such proceeds.

IX.

The deed of the La Crosse Company to Nash is not void, it is merely voidable at the utmost and the judgment against that Company is not a lien upon the property conveyed.

The proof does not establish the fact that Ludington was privy to the original purchase by Nash; Ludington, Kilbourn and Kneeland answer that he was not, which answers are responsive to the bill.

Against this is the testimony of Nash, fourteen years after the facts transpired, that Ludington was one of the parties *he heard*, was to be interested, or whose name was mentioned as one of the parties like to be or who would be interested. (Nash's Deposition, page .)

This is not enough to overcome Ludington's answer that he was not interested; on the contrary, it is rather corroborative of it. If Nash had bought for Ludington, it would hardly have happened that the matter would not have been mentioned *between them*; *instead of having heard of it, he would have known it*! But if Ludington bought of Kneeland, after Kneeland took the whole purchase, his communications would have been with Kneeland; and Nash might naturally enough have *heard* that Ludington had an interest. Kneeland and Ludington allege that they did not sell the property, but that the Company made the sale. Beside this when Nash sold out to Kneeland he required security from him. If Ludington had then been interested it is extremely probable that Nash would have required his indemnity as well.

X.

As to the heirs of Mrs. Kneeland, the supplemental bill filed July 2, 1872, alleges that "in the year 1864 they sold one third of said premises to the St. Paul Company and received therefor eighteen thousand dollars and upwards" (p. 42.) To this bill they plead the Statute of Limitations (p. 45.)

The Statute of Wisconsin in force at the time supposed to be applicable is as follows: Sec. 17 of Chap. 138 of the statutes of 1858, p. 821. Sec. 17 within six years.

Subdivision 6. An action for relief on the ground of fraud in cases which were heretofore solely cognizable by the court of chancery; the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the

facts constituting the fraud. The Kneeland heirs plead this statute. It appears by the complainants bill (p. 42) that more than the statutory period had elapsed between the date of the sale of property and the receipt of the money (1864) and the date of the filing of the bill 1872. The statute is a good bar.

The action matured when a supplemental bill would lie against these heirs for personal account, the time of the sale of the property and the receipt of the money.

If the complainants wished to avoid the bar of the statute by reason that they had no knowledge of the sale, they should have averred that fact in their bill, so long as the bill showed on its face that the statutory period had elapsed.

XI.

As to the interest of Mariner, this bill was dismissed as to him by stipulation, Nov. 13, 1863, October 26, 1872 the complainants moved to vacate this dismissal. Which motion was then denied with leave to renew it at the hearing. At the hearing the Court as a part of the final decree vacated the order of dismissal.

This dismissal was entered upon a contract between the parties executed by Mariner and the complainant's solicitor which has not been in any wise vacated or annulled and which still speaks, such a stipulation and the dismissal based upon it are not judicial proceedings. The court cannot review them for error or mistake. The stipulation can only be avoided by original bill.

This stipulation it is true was executed by the solicitor of the complainants, who cannot now remember why or upon whose authority it was done, but the act was within his apparent authority and he is solvent.

In September 1868 the complainants retained new solicitors,

(p. 31), they then knew from those solicitors that Mr. Carpenter had signed this stipulation and that the bill was so dismissed, Graham, so testifies p. 134, and the bill of revivor filed by the complainants against Kneeland's administrator, September 12, 1864, recites the fact as does also the supplemental bill filed by the new solicitors at the time of this substitution (p. 33.)

With this knowledge they lay by five years, and then after the witnesses are dead and after Mariner has made the deferred payment for the property and his grantor has failed and after the solicitor has forgotton why or upon what contract it was done, and after they have had performance of the contract, beneficial to them, had their nine years delay, p. 409, they seek to set aside the discontinuance.

It is too late to repudiate this act. Field vs. Farrington, 10 Wall 148. Dunlap Agency 172, note q. Gold Mining Company vs. National Bank, 98 U. S. 460.

If there was no fraud nor collusion between Carpenter and Mariner, why are not the complainants charged as between them and Mariner with knowledge of this dismissal when it was done? How can they have the benefit of their bill of revivor against Kneeland's Administrator and their supplemental bill against the St. Paul Company which recite this dismissal and not be charged with it? If the St. Paul Company, which was actually ignorant is to be charged with the result of this suit, because their attorneys had casually, before their retainer by that Company, heard generally of the existence of this suit, why are not the complainants to be charged with acts done by their solicitor in their name, *pori passu*?

Where a suit is dismissed voluntarily without stipulation, the Court will not vacate the dismissal, except under very special circumstances.

Orphan Asylum vs. McCartree, 1, Hopk. Ch. 372. Nor can a

bill of recovery, or a supplemental bill be filed, 2 Atk. 82. "It would be keeping up a right *in nubibus* and *in custodia legis* and parties would never know when to be at rest.

Between the time that this bill was dismissed as to Mariner and to vacate the dismissal nine years elapsed, November 1863 to October 1872. Mariner had sold the property in 1864, received his pay and the statute of limitations had run against a bill to recover it. This appeared by the supplemental bill against the St. Paul Company and by the answer of that company, it also appeared by such bill and answer that Mariner had no longer any interest in the property, so that he was no longer a necessary party to the original bill which was filed solely to set aside a cloud on the title, and the original bill is not sufficient to justify a decree against them for the proceeds, so long as they were realized while the suit was dismissed as to him.

Again, Mariner and Goodrich bought this property and paid for it in ignorance that Nash bought for Kneeland, and supposing that he bought for Cook. Mariner's Dep. p. 16, 17, 18. Goodrich's Dep. p. 181-191.

It was claimed below that because Mariner testified that he suspected that Nash bought for Kneeland that therefore he is charged with notice of the fact, but he also testifies that he followed up that suspicion through Goodrich, who had better means of knowledge, and that Goodrich after inquiry assured him that Nash bought for Cook, p. 167.

It appears from Burnell's deposition that this property was paid for in part with Cook's securities, p. 307–12.

It was supposed by the complaint's counsel upon the argument below that this bill must be sustained then upon the ground that the property of a corporation was a trust fund in the hands of the corporation charged with paying its debts, and that no person who obtained any of its property by sale, induced in bad faith on

the part of the purchaser, could hold it as against its creditors, however willing the corporation should be that the sale stand. That is, as we understand him, the creditors of a corporation had a sort of equitable lien upon its property, which the corporation could not divest by sale, unless both purchaser and vendor acted in the utmost good faith.

This doctrine was supposed by connsel to have been decided by the cases of Curran vs. Arkansas, 15 How. U S. and Wood vs. Dummer, 3 Mason, 308, and upon the authorities cited in the first of these cases.

How shall a creditor of a corporation obtain greater measure of relief, when there was no intent of the debtor to defraud him, when he was not considered, than an individual could where the act of the debtor would be fraudulent as to creditor?

Those cases are authority that the *capital stock of an insolvent banking company cannot be withdrawn* BY ITS STOCKHOLDERS, *without first paying its debts, but they go no further.*

We agree to that. Now, what of it;—what application has it to this case? Does it follow therefrom that all the property of a solvent railroad company is covered by an equitable lien to secure its debts; and that, if it in the end becomes insolvent, a creditor can inquire into and overhaul all the transactions of the company, made by it in good faith when it was solvent, and years before the creditor's debt accrued with which it was satisfied?

Does it even follow that if a director of an insolvent bank had made such a purchase of its property as it is alleged was made here, and after the bank had discovered the fact, it for some reason, its lack of available funds, or other prevailing reason, had been unable or unwilling to rescind, that therefore a creditor could years afterward avoid the sale?

A corporation aggregate has at common law the same right to dispose of its property as an individual. Angel vs. Ames,

§§ 187, 191. Although insolvent, it may make an assignment, preferring one of its creditors, unless forbidden by statute. Catlin vs. Eagle Bank, 6 Conn., 233. It may even prefer a stockholder. Whitwell vs. Warren, 20 Vt. 425—445 although insolvent.

The mere insolvency of such a corporation neither impairs its power to manage its affairs, nor converts its property into a trust fund for the benefit of its creditors, Angel vs. Ames, § 770; Pondville Co. vs. Clark, 25 Conn., 97; Coburn vs. Boston &c. Co., 10 Gray, 243. Taylor vs. Ins. Co., 14 Allen 353.

At the hearing the complainants sought to amend their bill by alleging.

First. That the company in 1857, before the confirmations pleaded became, and ever since has remained hopelessly insolvent, that such confirmation was without new consideration, and was made with the intent to hinder, delay and defraud creditors of the company, and that the complainants were creditors at the time of the confirmation.

Second. That the defendant's title to part of the premises through the foreclosure of the mortgage made by the Fond du Lac Company to Holton, for the original purchase money, in a suit against the complainants and defendants, set up by the defendants in their answer ought not to prevail, because Nash undertook and promised to pay the mortgage as part of the consideration of the purchase, and that Kneeland promised to pay the same when he purchased, and being so obliged to pay the mortgage the foreclosure sale and purchase were but a payment of the mortgage.

Third. That the company, instead of Kneeland and Kilbourn made the sale to Nash.

The first amendment sets up an entire new ground of re-

covery. The subsequent bankruptcy and fraudulent intention of the company in making the release and confirmation pleaded and indebtedness of the railroad company at the time of the confirmation.

There is no excuse shown for not making this amendment earlier, nor can any be shown. There is no pretence that the facts alleged were not known to the complainants and their solicitor. The pleadings and proofs in the Cleveland case show that he was cognizant of the facts before the bill was filed. The complainants must have known of the insolvency of the company when it happened. The motion to amend cannot therefore be allowed. Mitford, Ch. P. 324. Story's Eq. P. §§ 885, 891. If a witness has been examined the pleadings cannot afterward be changed, except in very special cases. Thorn vs. Germand, 4 J. Chy. 363. Witmarsh vs. Campbell, 2 Paige 67; Rogers, 1 Paige 424, both decide that a party must show some excuse for not alleging matters known to him at the time of filing the bill. Certainly when he is advised by the answer that they will be necessary to his action, he is not at liberty to lie by fifteen years, and then after the proofs are closed, the case argued and submitted for decision, amend the bill. What opportunity have the defendants to dispute or disprove the allegations.

If this practice can obtain, a complainant can conceal his cause, make proof before the examiner of matter entirely impertinent to the issue, and then at the hearing disclose his real case, and by an amendment bring it before the Court and get a decree based upon the amendment.

An equally fatal objection is that when the bill is so amended it will leave the property in the defendants; with the sale made in good faith by the Company; with the right of election to sue or rescind not excercised by any one! This interest a bare action for tort is not attached by the levy. If it is assets at all it is a

choose in action, and can only be attached by a creditors bill proper.

We have no objection to the allowing of the second amendment, if the door is to be opened. If it is allowed, it is as we conceive, the end of the case. It insists upon the performance of some of the contract, and therefore the whole must stand. Pierce vs. Nesbitt, 1 Hill, ch. 445.

In regard to the third amendment. It does not appear that the matter was alleged in the bill through inadvertance or hastily or without consideration, or without knowledge of the matters averred, nor does it appear that the party has made haste to amend. Wilbur vs. Collin, 1 Clarke, ch. 315.

E. MARINER,
Solicitor.

SUPREME COURT U.S.
FILED
APR 26 1880
J. W. MIDDLETON, Clerk

SUPREME COURT of the UNITED STATES.

OCTOBER TERM, 1879.

No. 289.

LAWRENCE G. GRAHAM AND DONALD D. SCOTT,

Appellants,

vs.

THE MILWAUKEE & ST. PAUL RAILWAY COMPANY, IMPLEADED WITH EPHRAIM MARINER AND OTHERS,

Appellees.

Brief and Points for Defendant, Milwaukee & St. Paul Railway Company.

JOHN W. CARY,
Of Counsel.

NEW YORK:
EVENING POST STEAM PRESSES, 208 BROADWAY, COR. FULTON ST.
1880.

Supreme Court of the United States.

OCTOBER TERM, 1879.

LAWRENCE G. GRAHAM AND DONALD D. SCOTT, *Appellants*, *vs.* THE MILWAUKEE & ST. PAUL RAILWAY COMPANY, IMPLEADED WITH OTHERS, *Appellees.*	No. 289.

This is an appeal from the Circuit Court for the Eastern District of Wisconsin.

The appellants filed their bill in the District Court of the United States for the District of Wisconsin June 2, 1860, stating that on the 21st day of September, 1858, they recovered a judgment in the State Court of Wisconsin against the LaCrosse & Milwaukee Railroad Company, for the sum of $11,188.11.

And in the same court, on the 26th day of November, 1858, recovered another judgment against the same company for the sum of $29,820.71. Executions issued on said judgments November 26, 1859, and, on the 29th of November, the sheriff of Milwaukee County levied said writs of execution on the lots in said bill named.

Record, pp. 1 and 2.

That on the 11th day of January, 1860, the appellants, in the District Court of the United States for the District of Wisconsin, recovered a judgment on these two judgments for the sum

of $44,392.32. That execution issued on said judgment January 26, 1860, to the marshal, and, on the 27th day of January, he levied said writ on the lots herein in question, which the bill alleges were the lands and property of the said LaCrosse & Milwaukee Railroad Company, subject to levy and execution. And that no part of said judgment has ever been paid or satisfied.

Record, pp. 2, 3 and 4.

That on the 15th day of June, 185[illegible], the said LaCrosse & Milwaukee Railroad Company was the owner in fee simple of the lots in question, and that they were then and there of the value of $100,000 and upwards. That Byron Kilbourn, Moses Kneeland and James Luddington were three of the Directors of said company. That said Kneeland and Luddington were appointed a committee to sell and dispose of said lands, and which they knew were worth more than $100,000, and " that Kilbourn and Luddington, then and there designing and " intending to injure and defraud said company and its credi- " tors, and disregarding their duties as directors as aforesaid, " in the premises, and intending unlawfully and fraudulently to " acquire to themselves and the said Kilbourn, or some other " person or persons, by a violation of their duties as Directors " as aforesaid, the said lands, for a grossly inadequate price; " did sell and transfer said lands, worth, as they then and " there well knew, more than $100,000, to one Charles D. " Nash for the nominal consideration of $20,000 in bonds or " stock of said company defendant, but that said Kilbourne, " said Kneeland and said Luddington, or one of them, fur- " nished to said Nash, directly or indirectly, whatever the " said Nash pretended to pay to said company for said lands, " and that said sale was made to said Nash withthe fraudulent, " secret arrangement and understanding between said Nash " and said Kilbourn, said Kneeland, and said Luddington, or " one of them; that said Nash should thereafter, when " requested by said Kilbourn, Kneeland, or said Luddington, " convey or transfer said lands to said Kilbourn, Kneeland and " Luddington, for the benefit of said Kilbourn, Kneeland and " Luddington, for a nominal or no consideration; and that " said Nash was wholly disinterested in said pretended sale to

" him of said lands; that soon after the conveyance of said " lands to said Nash, that said Nash did, in pursuance of said " fraudulent and corrupt arrangement hereinbefore stated, " convey and transfer said lands to said Kneeland for no con- " sideration, or for a nominal consideration, or pretended con- " sideration."

Record, p. 4.

That Kneeland soon after conveyed one-third to Ludding- ton for no consideration, in pursuance of said corrupt agree- ment, and now holds two-thirds for himself and Kilbourn. That Kneeland, Kilbourn and Luddington pretended to hold said lands as aforesaid, now worth more than $200,000, in fraud of appellants' rights as creditors of said company defendants, and by reason of a violation of their duty as Directors, as aforesaid, and as Trustees of this same property. That the conveyance is a cloud upon the title to these lands, and an impediment in the way of the execution of said writ. That defendant Mariner has some interest in the premises, but that he purchased with full notice.

Record, pp. 4 and 5.

"That Selah Chamberlain, defendant, has and holds a large " sum of money by him received out of the earnings of said " company defendant's raidroad, to wit, more than $100,000, " received by him under and in pursuance of a certain lease " by and between said railroad company defendant and said " Chamberlain, which said company executed, and said Cham- " berlain accepted, with intent to hinder, delay, and defraud " the creditors of said company defendant, and which ought " to be applied to the satisfaction of appellant's judgment."

Record, p. 5.

The bill prays that said lots be declared subject to the lien of appellants' judgment, and that appellants may sell the same, and that Kneeland, Kilbourn and Luddington may be decreed to join in a conveyance to the purchasers. That they be perpetually enjoined from claiming the same, and that their conveyances may be declared void. Also general relief. And as to Chamberlain, that he may be decreed to account.

Record, 7.

Kilbourn, Kneeland, Luddington and Mariner demurred to the bill for multifariousness July 5, 1860.

Record, p. 9.

August 13, 1860, the complainants dismissed the bill as to Chamberlain on their own motion.

Record, p. 9.

The bill was taken, as confessed by the La Cross Company September 3, 1860. November 13, 1860, the demurrer was overruled.

Record, p. 10.

December 8, 1880, Moses Kneeland answered: Admitting complainants' judgments, denying that a portion of said property was owned by the La Crosse & Milwaukee Railroad Company. Admitting that it held the title to other parts thereof subject to certain mortgages, tax deeds and unpaid taxes. That its title was in dispute as to a large part thereof. That George H. Walker, through whom the La Crosse Company derived its title, had commenced a suit to cancel said title for the reason that he conveyed it to the Milwaukee, Fond du Lac & Green Bay Railroad Company for depot grounds, and was induced to do so by reason of the benefit which would accrue to him as the owner of real estate in the vicinity, and that the depot had been established in another part of the town. That defendant company acquired its title by consolidating with said Milwaukee, Fond du Lac & Green Bay Railroad Company. That the defendant company had no use for these lands, which are over a mile distant from its road. That title was in dispute. Most of the lots were under water, and to have docked and filled them would have cost from $30,000 to $35,000. That the company offered the property to any person who would buy at from $18,000 to $28,000, according to the warranty required and terms and manner of payment, but could not procure a purchaser at these prices or at any price for cash. That in the latter part of August or 1st of September, this defendant informed C. D. Nash of the terms and price at which the premises could be purchased, and requested that he would purchase the same for himself and one Cook, who was absent from the City.

That said Nash inquired into the matter, and in a few days told said defendant that he would purchase said premises at the price and terms offered, if this defendant would take an interest in such purchase, to which this defendant agreed, provided said Cook should, on his return, desire this defendant to take such interest in said purchase; and upon such agreement by said defendant the said Nash made a proposition in writing to purchase said premises of said company defendant, by which said Nash, in substance, agreed to purchase the said premises and pay therefor the sum of twenty-five thousand dollars ($25,000)—ten thousand dollars ($10,000) in the bonds of said company, secured by notes and mortgage of the farmer's, and fifteen thousand dollars ($15,000) in full paid stock of said company, upon the termination of the suit commenced by the said George H. Walker for the cancellation of the conveyance from him, which proposition was accepted by said company, and a quit claim deed executed of the lots in the Fourth Ward, and an agreement in writing to transfer the lots in the Fifth Ward to said Nash should the same be adjudged to be the property of the company, which agreement is annexed as Exhibit A, and that said Nash paid the consideration.

He denies that he ever advised the company to make the sale, and says that he received knowledge of the price and terms of sale from Dr. Judd, President, and communicated the same to Nash.

He denies that the premises were worth one hundred thousand dollars ($100,000), and alleges that the property then and now is almost entirely speculative.

He denies that there was any other agreement between him and said Nash, or that there was any intention to injure the company.

That Cook afterwards declined to take any interest in the purchase, and Nash requested this defendant to take the whole thereof. That he requested Luddington and Kilbourn to take an interest therein, which Luddington agreed to do, and Kilbourn said he would think of it. The lots were then transferred, one-third to Luddington, and he received his pay therefor, and Kilbourn afterwards took one-third, and he transferred one-third to him. That he afterwards settled with Walker and procured his suit to be dismissed.

He further says, that at the time of said purchase the said defendant company was not indebted to the said complainant

in any sum whatever. That the defendants have been in possession ever since, and have been improving said property; and since the purchase they have expended over fifteen thousand dollars ($15,000) in valuable improvements in docking and filling the same and making streets adjacent thereto.

That after the conveyance of said property to Nash, and by Nash to the defendant, and after the commencement of the suit by Newcomb Cleveland against this defendant, Luddington and Kilbourn, in the District Court of the United States for the District of Wisconsin, to vacate said sale and have said property applied to the payment of this judgment, this defendant submitted to the Board of Directors of said company defendant, the bill of complaint and the answer in the said suit; and this defendant, for himself and for the other defendants interested in said premises, and with their authority and consent, offered to said Board of Directors to reconvey all and singular the said premises to said company defendant, provided the said company defendant would pay back the consideration of said purchase, and pay back the moneys expended by these defendants in permanent improvements and for taxes and encumbrances, with interest at the rate of seven per cent. per annum; and that said Board of Directors, after examining the property, wholly refused to accept such proposition. That said company defendant, after having been fully and fairly advised of the facts set forth in the bill of complaint in this cause, and after having read and examined the bill of complaint of Newcomb Cleveland against the La Cross & Milwaukee Railroad Company, these defendants and Selah Chamberlain, heretofore exhibited, and the answer of this defendant in said suit, and after fully and fairly examining the property and premises described in said bill of complaint, by resolution of its Board of Directors (a copy of which is annexed to said answer, marked Exhibit B), confirmed such sale, and executed and delivered to this defendant a quit claim deed of said premises to carry the same into effect, and release all claim, right or equity which it had in said premises.

All other allegations of the bill are denied.

Record, pp. 10 to 16.

The answer of Luddington was filed on the 7th of January, 1861. His answer is, in substance, the same as Kneeland's, so far as Luddington was connected with the matter

Record, pp. 16 to 21.

The defendant Mariner answered, denying the substance of the bill, except the purchase by Nash, and set forth that he acquired his interest for a valuable consideration.

Record, pp. 21–25.

These answers were replied to.

Record, p. 26.

On the 13th of November, 1863, Mariner filed a stipulation, signed by himself and Matthew H. Carpenter, solicitor for complainants, stipulating that the bill in the cause be dismissed without costs to either party as to the defendant Mariner.

Record, pp. 28–29.

Kilbourn answered December 20, 1863.

Record, p. 27.

April 23, 1864, the death of Moses Kneeland was suggested to the court (Record, p. 27). On the 12th of September, 1864, the complainants filed their bill of *revivor* reviving the suit against the Lacrosse and Milwaukee Railroad Company, James Luddington, Byron Kilbourn, Selah Chamberlain, and James Kneeland, administrators of Moses Kneeland, and a subpœna was issued and served upon all of them.

Record, pp. 28 and 29.

October 2, 1866, leave was granted complainants to make new parties, as they should be advised.

Record, p. 30.

November 24, 1866, the complainant's counsel dismissed the bill as to Byron Kilbourn.

Record, p. 30.

On the 14th of September, 1868, the complainants, by leave of the court, filed a supplemental bill making the Milwaukee & St. Paul Railway Company a party defendant, in which they set forth the filing of the original bill, and set forth the substance thereof; and further set forth that this suit had been discontinued as to the defendants *Ephraim Mariner, Byron Kilbourn and Selah*

Chamberlain ; and stated that after the commencement of this suit the defendant, the Milwaukee & St. Paul Railroad Company, with full and complete notice and knowledge of the facts aforesaid, for no consideration, or some nominal consideration, took and received a conveyance or conveyances of all the real estate above described from the said Kilbourn, Kneeland, Luddington, Nash and Mariner, or some or one of them, and now holds the same in fraud of the rights of the said company defendant, and the rights of the complainants as creditors of said company, and claiming the same relief against the Milwaukee & St. Paul Railway Company as they were entitled to against said Kneeland, Luddington, Kilbourn and Mariner.

Record, pp. 31 to 33.

April 8, 1869, the Milwaukee & St. Paul Railway Company filed its answer, which sets forth that this defendent first received knowledge of the pendency of these proceedings from the said supplemental bill of complaint, and has since examined the record in regard thereto ; but denies that the defendant had any knowledge, information or belief as to any of said matter and proceedings prior to the filing of said supplemental bill, and further states that in 1864 this defendant purchased, and became the owner of certain lots, being a part of the lots described in said bill of complaint, and says that on said purchase, in consideration of the conveyance to this defendant of the title to said lots and premises, this defendant paid its grantors therefor over $54,000. That the consideration paid by this defendant for said conveyance was a good, ample and full compensation for said premises, and all or more than they were then worth.

And this defendant denies that it made said purchase or took said conveyance with full and complete notice and knowledge of the facts stated in said supplemental bill of complaint, or with any notice or knowledge thereof whatever.

And it further absolutely denies that it took or received said conveyance or conveyances for no consideration or for a mere nominal consideration, but, on the contrary, says that it paid the consideration of $54,000 therefor, and that said sum was a full, complete and a lequate compensation therefor.

And it further sets forth that a part of the premises had been foreclosed on prior mortgages ; and that on the 24th day of

May, 1859, and after Kneeland, Luddington and Goodrich had ceased to be Directors of the La Crosse Company, and said company was fully aware of the sale to Nash, and the interest of Kneeland therein, the said Board of Directors of the La Crosse & Milwaukee Railroad Company, by resolution, ratified said sale, and executed to said Kneeland and Luddington a deed of confirmation of said sale ; *all of which took place and was on record before the filing of said complainant's original bill of complaint in this cause.*

That this defendant has been in the actual and peaceable possession of said premises since its purchase, and has made extensive and valuable improvements thereon, at a great cost and expense, and has rendered said property of great value ; that it constitutes a part of the depot grounds of said defendant in the City of Milwaukee, and is occupied in part by the depot buildings of said defendant.

Record, pp. 35 to 38.

The answer was replied to.

Record, 38.

July 2, 1872, the complainants, by leave of the court, filed their supplemental bill of complaint, making Sarah O. Chandler, Ellen C. Sexton, Frances Flint, and Moses Burr Kneeland, additional parties defendant herein.

This supplemental bill of complaint sets forth the proceedings in the original bill and the supplemental bills ; and further set forth what the defendants named in said supplemental bill were the children and heirs-at-law of Moses Kneeland, deceased, and prayed that the bill should be revived against them.

Record, pp. 40 to 43.

September 24, 1872, the said defendants last named, filed the plea of the Statute of Limitations to the said supplemental bill.

Record, p. 45.

January 17, 1873, on the hearing thereof, said plea last mentioned was sustained and allowed.

Record, p. 46.

October 26, 1872, a motion was made to vacate the dismissal of said cause, as to the defendant Ephraim Mariner; and on January 18, 1873, the motion was denied, with leave to the complainant to renew the motion on the final hearing.

Record, pages 47 and 48.

The hearing of the cause took place in May, 1875, before the Hon. THOMAS DRUMMOND, Circuit Judge.

Charles D. Nash, called as a witness, and proved the purchase of the premises by him and Kneeland's connection therewith.

Record, p. 50.

John H. Tweedy testified as to the value of the property in 1855.

Record, p. 60.

Edward D. Halton testified as to the value of the property.

Record, p. 70.

D. G. Power testified as to the value of the property in 1855.

Record, p. 80.

Edwin H. Goodrich was called by the complainants, and was examined in relation to the purchase by the Chicago, Milwaukee & St. Paul Railway Company.

Record, p. 87.

C. K. Wells was called for the complainants in regard to a tax title.

Record, p. 91.

C. D. Nash was recalled and cross-examined.

Record, p. 95.

Lawrence Graham was sworn for complainants. Proves that his contract, upon which his debt arose, was made July 5, 1855, with the Milwaukee & Watertown Railroad Company, which was consolidated with the La Crosse Company in September, 1856, and his work was done for the consolidated company in 1857 and 1858.

Record, p. 95.

B. K. Miller (Rec., p. 98) was sworn, and testified for complainant: Is an attorney, and attended to the foreclosure of a mortgage of $4,000 on part of these premises, given by the Bridgeport Savings Bank; his firm were attorneys for the Milwaukee & St. Paul Railway Company in 1864, at the time of the purchase of this property; sent abstract of premises to Mr. Mitchell.

Page 102. Ephraim Mariner was examined by complainant in regard to his purchase of an interest in these premises, and in regard to the foreclosure of the Bridgeport Savings Bank, and his sale to the Milwaukee & St. Paul Company.

Page 108. The deposition of B. K. Miller is resumed. Examined in relation as to his action as attorney for the company.

Page 110. Examination of E. Mariner was continued.

Page 131. Lawrence G. Graham, recalled by plaintiff, and cross-examination resumed; testifies to negotiations by Mr. Finch, a director of the Milwaukee & St. Paul Company to purchase his judgments in 1863.

Record, page 141. Asahel Finch sworn; he was attorney for the St. Paul Company, and negotiated in 1863 with Mr. Graham in regard to the payment of his judgment in stock of the Milwaukee & St. Paul Company.

Record, page 152. Statement relative to who were directors of the St. Paul Company.

Record, page 153. Joshua Stark sworn; testified in regard to his appearing, or Palmer & Stark appearing in the Bridgeport foreclosure suit for Graham and Scott.

Record, page 154. Matt. H. Carpenter sworn; testified relative to the stipulation to discontinue as to Mariner.

Record, page 167. Mariner recalled.

Record, page 187. Edwin H. Goodrich recalled.

Record, page 192. Mariner recalled.

Record, page 195. Exhibit 1, original agreement of purchase by Nash; Exhibit 2 bond of indemnity to Nash from Kneeland.

Record, page 203. Graham's contract with the Watertown road.

Record, page 210. Graham and Scott's petition in the land grant suit.

Record, page 215. Another petition.

Record, page 219. Petition of the Milwaukee & St. Paul Railway Company for possession of the road after ther purchase.

Record, page 222. An agreement between Kneeland, Luddington, Graham and Scott.

Record, page 223. Agreement of Graham and Scott with the Minnesota Railroad Company.

Record, page 224. Release of the La Crosse Company to James Luddington.

Record, page 225. Resolution of the La Crosse Company.

Record, page 227. Consolidation of the La Crosse & Milwaukee, and the Milwaukee, Fon du Lac & Green Bay Railroad.

Page 232. Consolidation of the Watertown Railroad and the La Crosse Railroad.

Page 235. Deed from the La Crosse Railroad to Nash.

Page 237. Deed from Nash to Moses Kneeland.

Page 238. Moses Kneeland to James Luddington.

Page 239. Second deed from the La Crosse & Milwaukee Railroad to Nash.

Page 240. Deed of Moses Kneeland to Edwin H. Goodrich.

Page 241. Deed from Edwin Goodrich and wife to Mariner.

Page 243. Sheriff's deed to the Bridgeport Savings Bank.

Page 244. Bridgeport Savings Bank deed to Moses Kneeland.

Page 245, Agreement with Kneeland, Mariner and Luddington, to Bridgeport Savings Bank.

Page 247. Warrantee deed of Marnier and wife to Russell Sage.

Page 249. Deed of Moses B. Kneeland to Edwin H. Goodrich.

Page 250. Edwin H. Goodrich to Russell Sage—deed.

Page 252. Warrantee deed from James Luddington to Russell Sage.

Page 253. Russell Sage to the Milwaukee & St. Paul Railroad Company.

Page 255. Foreclosure proceedings of Bridgeport Savings Bank against the La Crosse Company.

Page 270. Bill of Newcomb Cleveland against the La Crosse & Milwaukee Railroad Company and others.

Page 281. Answer of Moses Kneeland thereto.

Page 291. Answer of James Luddington thereto.

Page 297. Answer of Byron Kilbourn thereto.

Page 299. Answer of Ephraim Mariner.

Page 300. Testimony of Alexander Mitchell on behalf of the defendant. Testifies to the purchase of the property in question in 1864; that it was a full price; contracted for and paid for, and supposed it received a perfect title; have made large improvements thereon; didn't know at the time of the purchase that the complainants in this cause had any claim whatever upon this property, nor do I know that any member of the St. Paul Company knew it; the company paid $54,000 for the property in question; the negotiations with Finch to purchase complainants' claim had no reference to these lots, but to the Eastern Division of the La Crosse Railroad.

Page 306. Levi Burnell testifies; and proved that the bonds and mortgages paid by Nash were originally sold by the company to C. D. Cook.

Page 313, Henry L. Palmer; testifies as to his appearance for Graham and Scott in the Bridgeport foreclosure suit.

The testimony of Stoddard Judd, President of the company, and of Jonathan Taylor, and others, witnesses examined in the case of Newcomb Cleveland printed in a supplement to the record, was read in evidence under a stipulation. This testimony relates to the value of this property at the time of the sale to Nash.

On the hearing the bill of complaint was dismissed as to all the defendants, from which decree this appeal is taken by the complainants.

I.

Complainants bill is multifarious. It joins two separate and distinct matters having no connection, and against parties who are entirely separate and distinct, the one having no interest in the other.

The defendants Kneeland, Luddington, Mariner and Kilbourn, had no interest in Selah Chamberlain's lease of the

railroad, or his accounting therefor, and he had no interest in their land speculations. The parties are entirely separate. The subjects are entirely distinct and separate and have no connection whatever with each other.

There was a demurrer for this cause, but before it was heard the bill as to Chamberlain was dismissed, but by the bill of revivor filed in 1864, the suit was again revived against Chamberlain, and the objection therefore stands in full force against the bill.

II.

The bill should be dismissed for want of equity.

(*a.*) There is no statement in the bill that the complainant was unable to collect his judgment at law. No allegation that there was no other property upon which the execution could be levied. It does not appear that the complainant had exhausted his remedy at law. There is no allegation that the La Crosse Company was insolvent, or that the execution could not be made out of other property,

(*b.*) Granting that the transfer of this property to Nash, and its subsequent conveyance to Kneeland, was a fraud upon the La Crosse Company, the complainants are in no position to assert the rights of the company and claim that it should be set aside. It is none of their business. The La Crosse Company does not and has not asked to have it set aside.

Prosser *v.* Edmonds, 1 Young & Col. Ex. Eq., 481.

Crocker *v.* Bellangee, 6 Wis., 645.

Milwaukee & Minnesota R. R. Co. *v.* Mil. & Western R. R. Co., 20 Wis., 174.

Johnson *v.* Bennett, 39 Barb., 237.

Buell *v.* Buckingham, 16 Iowa, 248 and cases cited.

The only authority to the contrary that I have been able to find is Don Quixote.

(c.) Because the bill does not allege that complainants or any one else were creditors of the La Crosse Company at the time of the sale. To render a conveyance fraudulent as to creditors it must be voluntary, with an intent to hinder and delay, or defraud creditors of grantor being indebted at the time.

A voluntary deed is valid, except as to creditors, against all the world, and if there are no creditors at the time, and it is not made for the purpose of defrauding creditors, a subsequent creditor cannot take advantage of it.

Backhouse *v.* Jett, 1 Brock., 500.

A voluntary conveyance made by a party indebted at the time is void as to creditors whose debts existed when the gift was made, but it is not void if there are no creditors existing.

Sexton *v.* Wheaton, 8 Wheat., 229, and see p. 241.

In that case the bill did not charge Wheaton with having been indebted at the time he made the conveyance to his wife, and the court say: "The fact that he was indebted cannot be assumed, it must be alleged and proved.

See same case in 1 Am. Leading Cases, p. 1, and the note thereto.

Mattingly *v.* Nye, 8 Wallace, 370.

Hinde *v* Longworth, 11 Wheat., 199.

To invalidate a deed, evidence of indebtedness at the time, at least, as I conceive, amounting or approximating to, embarrassment must be shown.

Opinion of Gould, in Salmon *v.* Bennett, 1 Am. Lead. cases, 35.

There is nothing in this case tending to show that this conveyance was made with any intent to defraud creditors. The complainants' allegations, if true, would only make out a case of purchase by a Trustee of the trust property, which the *cestui que trust* might disaffirm, if it chose to do

so. But under the authorities above cited, no other person than the Trustee has the right to cancel such a sale.

But if there was a fraud, it was a fraud against the La Crosse Company alone; it was not void *ab origine*, but only voidable, and voidable only by the party in interest, which was the La Crosse Company, and not by a creditor. No stranger could interfere; no person unless some one having an interest in the land. No general creditor of the company, at the time of the sale, could do it, much less a subsequent one.

The authorities are uniform that a stranger cannot object to the invalidity of such a sale.

The case of Michoud *v.* Giord is a case where the Trustee of an estate purchased for his own benefit, and the heirs overhauled it, as they might.

The case of Curran *v.* State of Arkansas has no application. That was an attempt to withdraw the capital without paying the debts. The State was not a creditor of the bank, but a stockholder.

III.

There was no actual notice of any claim of complainants to this property brought home to the Milwaukee & St. Paul Railroad Company prior to its purchase.

The record fee title of the premises was in Mariner, Luddington and Kneeland's heirs at the time when it was purchased by the Milwaukee & St. Paul Company. The conveyance from the railroad to Kneeland, even on complainants' theory, was only voidable, not void. It vested the title in the purchasers. The judgment of complainant was not a lien upon said premises. It was, therefore, not notice of any right in complainants to this land.

There is no such thing as a levy on land on an execution. There is no provision for it, and it is not necessary. The statute makes the judgment a lien upon the real estate of the judgment debtor, and no levy is required or can be made.

The judgment itself when docketed, becomes a lien on all lands of the defendant. But it is not a lien on lands not standing in the name of the judgment debtor until enforced. If the conveyance is valid to transfer the title from the judgment debtor, it is not affected by a judgment against him after such transfer.

The endorsement of a levy on an execution issued on a judgment does not increase the lien nor give notice of it to a purchaser from the apparent owner. Such endorsement is not constructive notice to a purchaser. It is not pretended that any actual notice to the Milwaukee & St. Paul Company has been proven. No notice to it is shown.

The negotiation of Finch, a director of the company, with the complainant for the purchase of this judgment, in 1863, had no reference to the property in question. It was prior to said purchase, and before the purchase was even contemplated. Mr. Mitchell's testimony explains the object of that negotiation. It was because it was a lien upon the Eastern Division of the La Crosse Railroad, and not on this property.

Notice of the pendency of this suit to the individual directors of the company was not notice to the company.

In Loomis *v.* Eagle Bank of Rochester, 1 Disney, 285, the payee of a note, who procured it to be discounted by the bank, was a director and member of the Financial Committee at the time and knew there was a defense, yet the court held that that was not notice to the bank.

The declarations of individuals who are directors of a bank, not forming a part of an official act, are not admissible to prove an antecedent fact against the bank.

Pemgewassett Bank *v.* Rodgers, 18 N. H., 255.

Notice to a bank director, or knowledge obtained by him while not engaged officially in the business of the bank, will not be notice to the bank; but notice to a director, while engaged officially as such, will be notice to the corporation.

Bank of U. S. *v.* Davis, 2 Hill, 451.

Notice given to an agent relating to business which he is authorized transact, while actually engaged in transacting it, will, in general, enure as notice to the principal.

McEwen *v.* Montgomery Ins. Co., 5 Hill, 101.
Story on Agency, § 140*b*.
Dunlap's Paley on Agency, 266*b*.

There was, therefore, no proof that the Milwaukee & St. Paul Railway Company ever had any actual notice of the existence of the plaintiff's claim, or of the pendency of this suit.

IV.

This proceeding was a lis pendens, or constructive notice to the Milwaukee & Chicago Railway Company, only as to Luddington's third, for the reason that it was not pending as to Moses Kneeland, or his heirs, or as to E. Mariner, at the time of the company's purchase.

The suit was originally instituted against Moses Kneeland, James Luddington and Ephraim Mariner. Kneeland died in February, 1864, and the suit thereby abated as to him. He died intestate. In September, 1864, the suit was revived against James Kneeland, his administrator, but has never been revived against his heirs.

Kneeland left four children as his sole heirs. His lands descended to those children.

2 Taylor's R. S. of Wis., p. 1170.

In 1872 the complainants attempted to revive this suit against them, but were defeated.

These heirs conveyed to the defendant company in 1865, more than a year after Moses Kneeland's death.

The administrator did not take the lands, or any interest in them, except the rents, until the estate was settled or delivered over to the heirs.

2 Taylor's R. S. of Wis., p. 1221.

This estate was settled, and the lands were delivered over to the heirs.

The revival of the suit of Moses Kneeland against James Kneeland, the administrator, was not constructive notice to this company, as a purchaser of said lands from the heirs of Moses Kneeland.

There was no attempt to revive it against the heirs until 1872, long after the purchase, and that attempt was defeated.

As to the defendant Mariner, this suit was discontinued by a stipulation of the parties, on the 13th day of November, 1863, and was not revived, as to him, and no attempt at revival made until 1872, and was not revived until the entry of the final decree on the 26th day of April, 1876. There was no suit pending as to him for about nine years. The Milwaukee & St. Paul Railway Company purchased his interest on the 13th day of July, 1864. This suit, therefore, was not constructive evidence to said company as purchaser of complainants' rights.

As to the interest, therefore, of Mariner and Kneeland, purchased by the Milwaukee & St. Paul Company, there was no *lis pendens* at the time of the purchase, and this company is not chargeable with notice of complainant's rights or equities, as to their interest, by reason of the pendency of this suit, for it was not pending as to either of them at that time.

V.

The pendency of the suit against Luddington at the time of the purchase of the Milwaukee & St. Paul Railway Company, was constructive notice of complainants rights as to the interest purchased of Luddington, but was neither constructive nor actual notice of the complainants' rights as to the interest held by Mariner or the heirs of Kneeland.

Lis pendens is constructive notice only, not on the ground that the purchaser has any actual knowledge of the claim, but that he is chargeable with notice without regard to whether he has any actual information or not; but it is no notice beyond the suit actually pending. Had a decree passed in the case as it stood, when the purchase was made, it would only have reached the interest of Luddington, and not the interest of Mariner or of the Kneeland heirs.

The law does not presume that the purchaser had seen the complainants' complaint, or was cognizant of the facts therein

stated, but he is charged with constructive notice only. No fact was brought to the knowledge of the purchaser, he had no knowledge that would put him on enquiry, and the constructive notice as to Luddington's interest cannot be held actual or constructive notice as to the interests of the other grantors.

The complainants' theory of the case would require you to hold that the constructive notice which arises from the pendency of a suit against one party, from the fact that it is pending to be actual notice as to all others against whom suit is not pending. Such a doctrine cannot be upheld. Therefore, the Milwaukee & St. Paul Railway Company being *bona fide* purchasers for a full and adequate consideration of the interest of Mariner and Kneeland's heirs, without notice, actual or constructive, of plaintiffs' equities, are not liable in this action as to those interests.

VI.

The sale by the La Crosse Company to Nash was not a fraud, either actual or constructive, upon that company.

It was not an actual fraud, for the reason that the company had this property, for which it had no use, and were offering it for sale in the market, and desired to sell it, and the sale made was for the full price which they were asking for the property, and for which it had been offered to others. It acted with full knowledge of all the facts except that Kneeland was interested in the purchase, and afterwards, and with full knowledge that Kneeland was the party interested therein, and that Luddington and Kilbourn had become interested with him, and after full deliberation the full board refused to rescind the contract and return the purchase money, first in 1858 and again in 1859, but, on the contrary, ratified and confirmed the sale, and directed that a quit claim deed should be executed by the company to Kneeland for the purpose of quieting his title.

All this took place prior to the filing of the complainants' bill, and before he had acquired any rights to the property.

There was no actual fraud in this transaction. No fraud is proven. Kneeland made no representations in the matter. No act of his proved, except that he was interested in the purchase. The fact that he was so interested, is a constructive fraud only, which the company alone could take advantage of,

but, when brought to their knowledge, they refused to do so, and ratified the sale.

The premises were not sold for an inadequate price, but it was all that they were worth, and more than subsequent sales and events warranted.

The only conflict upon this point is in the testimony of witnesses who gave their opinion as to what that property was worth in 1855, when called many years afterwards. But the testimony of the President of the company, of Jonathan Taylor, and the persons who were actually engaged in trying to sell the property should have much greater weight than the opinions of persons not interested, and taken years after the transaction.

The depot of the Milwaukee, Fon Du Lac & Green Bay road was located there in the fall of 1853 or early in 1854. These grounds were procured for that purpose, which, no doubt, created a temporary excitement in real estate, which, when the depot was afterwards located in another part of the town, more than a mile distant, reacted and operated generally to depress property in this vicinity. (See testimony of Jonathan Taylor).

The La Crosse Company had no use for this land (or rather water). It was yielding no rent; it was expensive to keep, on account of the taxes, and was offered for sale to all the real estate men in town. It was offered to the defendant Mariner by the company for twenty-eight thousand dollars ($28,000) in traps. It was offered to J. B. Cross, and examined by him, for this price. It was offered to C. D. Cook for twenty thousand dollars ($ 0,000), to be applied in part payment of his contract for grading, and refused. It was finally sold to Nash for Kneeland, a director, for twenty-five thousand dollars ($25,000), by quit-claim deed subject to all incumbrances and disputes in regard to the title. Three suits were then pending in relation thereto; and it was sold subject to the mortgage to the Bridgeport Savings Bank for over four thousand dollars ($4,000), and subject to a mortgage of John B. Lee of about nine hundred dollars ($900), and to taxes amounting to over six thousand dollars ($6,000). The whole property was unproductive, and requiring a large outlay to bring it into any use.

Dr. Judd, the President of the company, says that a clear title, free from all encumbrances, would have been worth perhaps forty thousand dollars ($40,000); but subject to encum-

brances and the defective title it was not worth over twenty thousand dollars ($20,000). He was unable to get that for it in obligations of the company, and was unable to sell for cash at any price.

And as corroborative evidence that the witnesses of the defendants were more correct in their estimate than those of the complainant, it appears that the purchasers from Nash paid twenty-five thousand dollars ($25,000) for the property, five thousand dollars ($5,000) on mortgages, six thousand dollars ($6,000) for back taxes, and twenty thousand dollars ($20,000) for permanent improvements, besides what was paid for George H. Walker's claim; and after holding the property for nine years, sold it for fifty-four thousand dollars ($54,000) in bonds, as the best price that could be obtained for it.

VII.

Has the complainant any standing in court?

His bill is to remove an obstruction out of the way of his executing his execution. That judgment was docketed in 1859. Its lien has expired; the rights of others have attached, and the complainant has no interest.

VIII.

Should the bill be sustained?

The price paid by the Milwaukee & St. Paul Railway Company being the full value of the premises at the time, equity would adjudge Mariner and Luddington the principal debtors, and hold the lots as security.

Should an account be ordered, complainants could only recover the value of the lands at the time of sale.

JOHN W. CARY,
Of Counsel for Defendant.